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ABSTRACT

Presentations delivered at the National School Boards Association (NSBA) Council of School Attorneys 1990 school law seminar are compiled in this publication. The following papers are included: "The 1989 Revolution in Employment Discrimination Law: Procedure Alters Substance," by Charles F. Abernathy; "Special Education Litigation: The Preparation & Trial," by John P. Heil; "Public Schools and Construction Failure: Prevention, Proof, and Recovery," by Lorence H. Slutzky; "Student Injuries: Liability for Personal Injuries Occurring During Extra-Curricular Activities," by Donald B. Bowerman; "Insurance Issues: Trends, Coverage, and Designation of Counsel," by Sheldon W. Grasley; "Recent Supreme Court Rulings and Congress' Response," by Gwendolyn H. Gregory; "Investigating Alleged Wrongdoing by Employees in the School Setting," by Richard E. Bump and Kelly Frels; and "Effect of Section 89 Repeal and Reinstatement of Prior Law: A Brief Overview," by Katherine L. Herber. Appendices include information on the NSBA Council of School Attorneys membership and recent publications. (LMI)

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NSBA Council of School Attorneys

School Law in Review 1990

Presentations from the Annual School Law Seminar
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SCHOOL LAW IN REVIEW—1990

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EDITOR

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Gwendolyn H. Gregory
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Jennifer A. Boykin
Manager, Legal Services

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1990
ANNUAL SCHOOL LAW SEMINAR

Charles F. Abernathy Professor of law, Georgetown University Law Center, Washington, DC since 1975, Mr. Abernathy teaches civil procedure, civil rights and constitutional law. A graduate of Harvard College (A.B), and Harvard Law School (J.D., LL.M.), Professor Abernathy is author of *Cases and Materials on Civil Rights* (1980) and *Equal Employment Opportunity Law* (with Schulman, 1989). He is now working on a new edition of his casebook, to appear in the fall, and a new treatise on Section 1983 liability, to appear next year. Professor Abernathy also lectures to federal judges and magistrates on civil rights law for the Federal Judicial Center.

Donald B. Bowerman Partner in the firm Hibbard, Caldwell, Bowerman & Schultz, Oregon City, Oregon, Mr. Bowerman's practice is primarily in the defense of medical, legal and casualty claims. A graduate of Northwestern School of Law of Lewis & Clark College, he has served as the vice-president of the Oregon State Bar, president of the Oregon Council of School Attorneys and currently is a director of the NSBA Council of School Attorneys. Mr. Bowerman has lectured and published extensively for major professional audiences such as the Oregon State Bar, California State Bar, American College of Trial Lawyers, and the Oregon Health Sciences University.

Richard E. Bump Partner in the firm Caplan & Earnest, Boulder, Colorado, Mr. Bump is a school law specialist providing routine advice and litigation services concerning all aspects of school district legal matters. A graduate of University of Colorado School of Law, he served as president of the Colorado Council of School Attorneys and is currently a director of the NSBA Council of School Attorneys. Mr. Bump is a frequent and popular seminar instructor and author for NOLPE, the NSBA Council of School Attorneys, the Colorado School Boards Association and many other education organizations in Colorado. His most recent publication is *Investigating Alleged Wrongdoing of Employees in the School Setting* (with Frels and Horner, 1990).

Kelly Frels Partner in the firm Bracewell & Patterson, Houston, Texas and head of the firm's School Law Section, Mr. Frels is author of over 25 school law articles and most recently published the second edition of his popular monograph *School Discipline: Polices and Procedures* (with Horner & Schneider-Vogel 1990) and *Investigating Alleged Wrongdoing of Employees in the School Setting* (with Bump and Horner, 1990). A graduate of the University of Texas School of Law, Mr. Frels is former president of NOLPE, chairman of NSBA's Council of School Attorneys, the Texas Bar's School Law Section and TASB's Council of School Attorneys.

Sheldon W. Grasley Director of Insurance Services for the Pennsylvania School Boards Association, Mr. Grasley manages the PSBA Insurance Trust which provides endorsed insurance products to 460 districts participating in the School Leaders program. Mr. Grasley also manages the operation of the School Boards Insurance Company which writes approximately $30 million of premiums covering Workers Compensation and Property and General Liability protection for Pennsylvania Schools. He received his undergraduate and graduate degrees from Bloomsburg State University. Prior to joining PSBA, he served for 15 years as a School Business Administrator for the Colonial School and Palisades School Districts.

Gwendolyn H. Gregory Deputy General Counsel for the National School Boards Association, Alexandria, Virginia, Ms. Gregory represents NSBA in filing of *amicus curiae* briefs in the U.S. Supreme Court and federal appellate courts in public education cases of national importance. She also serves as chief executive staff for the NSBA Council of School Attorneys and is editor and contributor to "Inquiry & Analysis"

and "A Word On..." published bi-monthly by NSBA. She is a graduate of the University of Denver College of Law and served as director, office of policy communication, Office for Civil Rights, DHEW prior to joining NSBA in 1977.

John P. Heil Partner in the firm Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, Omaha, Nebraska, Mr. Heil has practiced law in Nebraska since 1973. He is a graduate of the University of Michigan School of Law and a former Lieutenant, U.S. Naval Reserve. Mr. Heil is a school law and environmental law specialist and former president of the Nebraska Council of School Attorneys.

Katharine L. Herber Legislative Counsel for the National School Boards Association, Ms. Herber previously served in a similar capacity in the U.S. Senate. She is a former assistant prosecutor and administrative law judge and is graduate of Gonzaga School of Law, the National Judicial College and the Institute on International and Comparative Law (Guadalajara, Mexico). Her responsibilities for NSBA include representation of NSBA before the Congress and in the federal agencies on issues which impact school district fiscal management and operation.

Lorence H. Slutzky Principal in the firm Robbins, Schwartz, Nicholas, Lifton & Taylor, Ltd., Chicago, Illinois, Mr. Slutzky's practice focuses on state and federal civil litigation, trial and appellate litigation in governmental affairs, and construction and contract law. He is a graduate of William & Mary Law School at the University of Exeter, England and the John Marshall Law School. He is a frequent lecturer and has spoken before the Illinois Institute of Continuing Legal Education, the American Association of School Business Officials and the American Association of School Administrators, among others. In addition, he has published numerous professional articles on construction law and architect/engineer liability.

FOREWORD

This publication is a compilation of the presentations delivered at the NSBA Council of School Attorneys' Annual School Law Seminar on April 20-21, 1990 in New Orleans, Louisiana. In recent years, this publication was produced much later in the membership year. In response to the needs expressed by Council members for more timely information, we are publishing, unedited, the papers presented.

Due to the many favorable comments received from members, we have retained the format introduced in last year's edition of *School Law in Review*. Each article is perforated and three hole punched so that you can file information by subject area in 3-ring binders. To help you organize your school law library, the Council has just introduced notebooks with individual subject filing tabs.

The Council has also recently published three monographs: *Religion, Education, and the U.S. Constitution, Student Discipline Policies & Procedures: A Practical Guide,* and *Investigating Alleged Wrongdoing by Employees in the School Setting.* Also, *Sexual Harassment in the Schools: Protect Your District From Liability* will be available in June, 1990. Refer to the page 9-2 of this publication for order information.

I wish to thank the school attorneys who contributed their time, effort and expertise to this publication. I also wish to recognize the work of Naomi Gittins and Jennifer Boykin who prepared these articles for publication.

Patricia E. Baker
Chairman
Council of School Attorneys

THE 1989 REVOLUTION IN EMPLOYMENT DISCRIMINATION LAW: PROCEDURE ALTERS SUBSTANCE

Charles F. Abernathy
Georgetown University Law Center
Washington, D.C.

Last year a new Supreme Court majority revolutionized much of the federal law of employment discrimination — and the justices did it with a deft touch. Although there were some subtle changes in the substantive legal rules of Title VII[1] and related constitutional law,[2] the greatest changes came in the form of altered litigational or procedural rules designed for the trial analysis of employment discrimination claims. Although these appear to be mere procedural rules, they substantially modify the scope and usefulness of employment discrimination law. Moreover, since these procedural changes probably also apply to other civil rights statutes affecting state and local school boards,[3] the new cases may have a significant impact on the deregulation of employment and other education-related topics once closely superintended by the federal courts.

The importance of these changes may be best appreciated if we finally cure ourselves of the habit of ritualistically distinguishing between substance and procedure. In the first year of law school, we students began intuitively to define a distinction between substantive law and procedural law — if nothing else, we saw that civil procedure and criminal procedure have that distinctive word in their title and that it is missing from all other courses. We should have known better, even then,[4] but at least soon after graduation we learned that the substance-procedure dichotomy is false. Rather, the two are so intertwined as virtually to define each other: when there is a "procedural" filing fee of $100 for a "substantive" torts claim of $75, the substantive law of torts is temporarily repealed.[5] And similarly, if one's own testimony constituted conclusive proof of the existence of negligence, then this mere evidentiary rule would create the equivalent of strict liability.

So it is with the Supreme Court's opinions from last term. The procedural burdens that the Court has redefined so alter the results to be expected from litigation that the underlying law itself has been changed or extended. The cases cover several phenomena in the two major areas covered by Title VII: disparate impact analysis and disparate treatment analysis.[6] In the first area, I plan to discuss the burden of statistical proof placed on plaintiffs and the burden of showing business justification that falls on the employer. On the disparate treatment side, I plan to discuss three issues of special concern to school boards and educators — the evaluation of subjective hiring practices,[7] the use of the so-called mixed-motive defense,[8] and the adoption of race-based affirmative-action plans.[9]

Wards Cove and the New Litigation Burdens in Disparate Impact Cases

In *Wards Cove Packing Co., Inc. v. Atonio,*[10] the Supreme Court faced claims brought by unskilled minority cannery workers under the disparate impact branch of Title VII. Under this branch of the law, as distinguished from the disparate treatment branch, motive or intent to discriminate by race is irrelevant,[11] and the law is concerned with ensuring that no neutral rules have an adverse exclusionary impact on blacks unless they are justified by important business reasons.[12] Traditionally, these two concerns were evaluated at trial by assigning to the plaintiff the burden of proving adverse impact and to

the defendant the burden of proving its countervailing business justifications for the neutral rule at issue.[13]

The cannery workers in *Wards Cove* sought to prove that neutral hiring criteria adopted by the employer had kept them from being promoted to high-level, generally white-collar, positions with the company. Their evidence tended to show that lower-paying jobs went disproportionately to minorities, minorities who were under-represented in higher-paying jobs populated mostly by whites.[14] The Ninth Circuit had ruled in favor of the plaintiffs,[15] but the Supreme Court reversed on two major grounds: the first demanded a higher showing of proof from the plaintiffs than had been imposed by the appellate court; while the second, in two interrelated ways, lowered the burden of proof on the employer.

Wards Cove and the Showing Demanded of Plaintiffs

The Holdings Concerning Statistical Proof

Methodology of Statistical Proof in Disparate Impact Cases

Traditional Title VII principles have required that plaintiffs prove a neutral rule's disproportionate impact on their racial group by use of "comparative statistics."[16] Specifically, according to the early *Albemarle Paper Company*[17] case, the percentage of blacks excluded by the operation of a neutral rule, such as a high school diploma requirement or an intelligence test, is compared with the percentage of whites excluded by the same rule; if the percentage of blacks excluded is "significantly" higher than the percentage of whites excluded, the plaintiff has shown disproportionate impact.[18] The Ninth Circuit had held that the plaintiffs in *Wards Cove* satisfied their burden of presenting comparative data when they showed that the percentage of minorities was significantly higher than that of whites in low-paying jobs, with the opposite true for high-level jobs.[19]

Justice White's majority opinion rejected the plaintiffs' proof, pointing out that it was "flawed for several reasons."[20] First, and most important, the plaintiffs had committed a methodological mistake. In calculating exclusionary rates by race, one must identify the starting pool of qualified potential applicants, blacks and whites,[21] who would be subject to the neutral rule, then observe how many of those applicants are excluded by the neutral rule at issue. In other words, the essential first step in calculating exclusionary rates focuses horizontally on applicants versus hires for a given job.[22] Plaintiffs had focused on vertical comparisons between persons hired for one job and those hired for another.[23] This flaw can be graphically depicted below.

Job: Marine Biologist

Black Qualified Applicants	→	Neutral Rule	→	Black Actual Hires
White Qualified Applicants	→	Neutral Rule	→	White Actual Hires

Compare Black % Excl & White % Ecl

NO!

Job: Canning Line Machine Operator

Black Qualified Applicants	→	Neutral Rule	→	Black Actual Hires
White Qualified Applicants	→	Neutral Rule	→	White Actual Hires

Compare Black % Excl & White % Ecl

The Court's holding then, although it ostensibly deals only with the statistical burden imposed on the plaintiffs, essentially announces a substantive rule about when employers are liable and when they are not: there is no duty to maintain a workforce that is racially balanced at all levels.[24] Observing the chart closely, one can also see Justice White's second point, that discriminatory operation of a neutral rule with respect to one job tells us nothing about its operation with respect to other jobs.[25] This is because the compositions of the starting pools of qualified applicants for the two jobs are probably quite different.

The third flaw identified in the plaintiffs' proof is a more sophisticated version of the Court's second point. Occasionally, it is difficult for plaintiffs to define precisely the "starting pool" of qualified applicants; in such cases, they gather data based on proxy populations — the "surrogate class" that accurately resembles the real class of qualified applicants.[26] Justice White hypothesized that perhaps plaintiffs in *Wards Cove* saw the cannery workers as a surrogate class that approximated the applicants for those high-level jobs where minorities were underrepresented. This idea had no application to the facts before the Court, said Justice White, because there was no showing such persons did indeed apply for the other jobs or were qualified for them.[27]

Appraisal of Any Disparity Shown by Statistics

In addition to rejecting the probativity of the plaintiffs' statistical proofs, the Court also appeared to resolve, albeit obliquely, an ambiguous related question: assuming that plaintiffs had presented reliably gathered evidence of a disparity in minority and non-minority hiring, how great a disparity must be shown and who would be the judge of the sufficiency of the disparity?[28] By citing with approval a previous plurality opinion, the Court appeared to signal that the issue was a somewhat subjective one, appropriate for resolution by judges rather than statistical experts.

In a footnote in the previous term's decision in *Watson v. Ft. Worth Bank & Trust*,[29] a plurality had embraced the idea of judicial discretion, wanting to settle a long-standing split in approaches.[30] The plurality observed that

> [lower] courts appear generally to have judged the "significance" or the "substantiality" of numerical disparities on a case-by-case basis. At least at this stage of the law's development, we believe that such a case-by-case approach properly reflects our recognition that statistics "come in infinite variety and ... their usefulness depends on all of the surrounding facts and circumstances.[31]

Curiously, for such a difficult and long unsettled problem, the plurality's footnote drew no comment from those justices who otherwise opposed its views,[32] and one must surmise that after *Wards Cove*, the plurality view is the law. Appellate-controlled judicial subjectivity is now the measuring stick for significance.

Evaluation of the Holdings

The Court's holding on the sufficiency of plaintiffs' statistical proof confirmed pre-existing Supreme Court precedent.[33] In that sense it did not raise the burdens placed on plaintiffs in proving their cases. Yet, nevertheless, *Wards Cove* foreclosed an evolution that would have helped plaintiffs tremendously. Had the Ninth Circuit's approach been adopted, plaintiffs would have found it much easier to prove their cases for the simple reason that, factually, many employers find themselves with disproportionately high numbers of minorities in low-level jobs and disproportionately low numbers of minorities in high-level jobs. The vertical comparison of such job data would have allowed plaintiffs to carry their burden in virtually every case. Undoubtedly, the prospect of such potentially unlimited liability deterred the Supreme Court from adopting the Ninth Circuit's approach.[34]

One is tempted to say that the favoritism that the Ninth Circuit's approach would have shown plaintiffs is appropriate precisely because there is such a difference in minority and non-minority wage-earning and job status. But that observation fails for two reasons. First, there is the problem of causation. Title VII imposes liability on a particular employer, not on the government or society in general.[35] The problem of underutilization of minorities, on the other hand, is a broad social problem with collective causes

and responsibilities. To the extent that the particular employer is taking advantage of or adding to that problem, its actions can be readily attacked by use of the statistical methodology approved by the Court — the horizontal analysis of the impact of a neutral rule on all applicants.[34A]

Similarly, to the extent that an employer is intentionally discriminating, its practices may also be attacked directly under Title VII's disparate treatment analysis. Indeed, it appears that the dissenters in *Wards Cove* have mistakenly assumed the existence of intentional discrimination,[35B] or, more charitably, they wish to expand the usefulness of disparate impact analysis — via expansion of this rule regarding proof — so that this method of analysis can catch the unprovable cases of intentional discrimination.[36] As laudable as this goal may seem, it disserves the long-term agenda of the civil rights movement. The great contribution of Title VII's disparate impact rules has been in their abjural of any connection to intent or motive to discriminate.[37] Forcing the impact method of analysis to do double-duty in helping to prove cases of intentional discrimination runs the risk of confusing the now-distinct disparate-impact and disparate-treatment analyses used under Title VII. Blurring this line would probably harm disparate impact analysis by allowing the motive issue, a *sine qua non* of treatment analysis, to bleed over to impact analysis, fatally disabling the latter.[38]

The lesser holding in *Wards Cove*, the implicit adoption of judicial subjectivity in appraising significance of any disparity, also deserves comment, even though its adoption appears to have been non-controversial. While it may be that this aspect of the case merely signals once again the Court's dissatisfaction with the use of experts, especially in civil rights cases,[39] subtler considerations appear to be at issue. First, if impact analysis is to maintain its separate role under Title VII, it is only proper for judges, not experts, to make the determination of significance in disparate impact cases. Unlike statistical proofs in disparate treatment cases,[40] in which statistics are offered as inferential proof of intentional discrimination,[41] in impact cases the statistics are offered as direct proof of what they show, the comparative underutilization[42] of minorities. Such underutilization, in the absence of an economy-promoting reason for the neutral rule causing the underutilization, is precisely the harm banned by Title VII's disparate-impact rules.

Theoretically, any underutilization, no matter how small, would be undesirable under impact analysis. But social change is so endemic in American society, that some adverse impacts are too trivial to warrant judicial intervention; a social or demographic change might erase the adverse impact of a neutral rule before the courts could reach judgment.[43] The "significance" inquiry, in such circumstances, goes not to statistical significance, but to social significance: which cases show underutilization of minorities to be so pronounced that judicial intervention is warranted?

Seen from this perspective, one can see a caveat that must be applied to *Wards Cove's* view of statistical significance. While ordinarily this is a decision for the judge and not the statistical expert, there are cases where the courts would need to hear from experts before making their determinations. These cases are those in which the plaintiff has gathered data based on proxy or surrogate classes.[44] In such situations, as in Gallup polling at election time, the expert will need to apprise the judge of the range of error that his sampling technique has introduced into the data results. Thus, a twenty-percentage-point difference in black and white exclusionary rates might be very significant if based on the actual labor pool, but it would be insignificant if sampling had introduced a possible error rate of +/- 10%. Thus, in surrogate class cases, the expert's testimony informs the judge's ultimate decision of social significance.

Wards Cove and the Rebuttal Burden Placed on Defendants in Disparate Impact Cases

The Holdings Concerning the Business Justification Defense

Burden of Proof Redefined

Although the Supreme Court last year did nothing more than forestall change on the plaintiffs' side of disparate impact cases, it introduced substantial modifications on the defendants' side. Most clearly visible was the alteration of the burden-of-proof rules attached to assertion of the so-called business necessity defense. The language of the original *Griggs* decision, which had established the ground rules for disparate

impact analysis,[45] quite clearly indicated that in order to defeat a proven plaintiff's case of significant underrepresentation of minorities, the defendant would be required to carry the burden of proof on the affirmative defense of business necessity.[46] The circuits had so read *Griggs*,[47] and the Supreme Court, with some candor — but not much, quickly admitted as much in *Wards Cove* when it said that "[w]e acknowledge that some of our earlier decisions can be read" as adopting such a position.[48]

The *Wards Cove* majority went on to note, however, that its precedents had not distinguished between the sub-components of burden-of-proof — production burden and persuasion burden.[49] The Court then held that it is only "employer's production — but not persuasion — burden" to present evidence of business necessity; the "persuasion burden here must remain with the plaintiff."[50] This brought the burden-of-proof rules used in disparate impact cases into line with those used in disparate treatment cases, where such rules help in resolving the all-important issue of intent to discriminate.[51]

The dissent's position was a simple one: it is inappropriate to bring the two lines of cases parallel because the burden-of-proof rules respond to two different issues in the two lines of cases.[52] In disparate treatment cases the burden-of-proof rules apply only to the first issue in the case, proof of intent; the rules, emphasizing a shift only of production burdens, follow the flow of circumstantial evidence on this one issue. In disparate impact cases, on the other hand, said Justice Stevens, the first issue of statistical disparity has already been decided, and the court's attention has moved on to a second issue, the existence of a business justification defense.[53] In essence, the dissenters argued, the appropriate comparison is between business necessity and the disparate-treatment issue of bona fide occupational qualification: the former, like the latter, is an affirmative defense.[54]

Business Necessity Defense Itself Redefined

Stepping beyond mere changes in procedure and proofs, the Court in *Wards Cove* also redefined the very scope of the so-called business necessity defense, converting it into the business justification defense. Quite pointedly, the Court observed that "there is no requirement that the challenged practice [or neutral rule] be 'essential' or 'indispensable' to the employer's business for it to pass muster."[55] Although the Court had never previously announced the meaning of "necessity" — only having held that more than a rational basis for the rule was required,[56] — the quoted language from *Wards Cove* seemed to exhibit a significant change in connotation from the original *Griggs* language which, in describing the defense, noted that the "touchstone is business *necessity*."[57]

Although the words used in *Wards Cove* seem distinctively different, it is difficult to say exactly how much of a change from prior practice the Court intended. This is because, despite all of its authoritative language in this area, the Supreme Court had never in practice been quite so demanding as the phrase "business necessity" might have led one to expect. In *New York City Transit Authority v. Beazer*,[58] for example, the Court was called upon to review a safety-related rule that applied to all workers when only 25% of the jobs at issue were safety-sensitive. Even though the rule, virtually by definition, was unnecessary for three-quarters of the jobs it covered, the Court upheld its use. Ironically, Justice Stevens, whose dissent in *Wards Cove* charged the majority with insensitively downgrading the business necessity inquiry,[59] wrote the *Beazer* opinion.

Appraising the magnitude of change wrought by *Wards Cove* is also difficult because the business justification inquiry is not now, nor was it even before *Wards Cove*, the end of the full balancing inquiry that applies in disparate impact cases. The Court has long recognized a three-step analysis: plaintiff would prove through statistics that a neutral rule had a disparate impact on his group, defendant would show business necessity for the neutral rule at issue, then plaintiff could counter a successful defense by showing that other "less drastic alternatives" could also serve the employer's business needs.[60] (If one looks logically at this three-part construct, the business necessity defense could never have really meant literally "necessary," for if an employer literally proved that a neutral rule was essential, then there would be no alternatives left for the plaintiff to prove or the courts to consider at the third stage of analysis.)

Seen in this way, the business "necessity" defense never required proof that the rule was essential: a lesser showing was satisfactory, and

the real burden was on the plaintiff to show that the rule was *not* necessary because other alternative rules were available. Indeed, there were some such cases before *Wards Cove* that conducted precisely this inquiry.[61] And *Wards Cove* itself, in a subsequent section, continued to authorize the less-drastic-alternatives inquiry that had been previously approved.[62]

The gist of this discussion is that one must look at the overall results of the full three-part test, not simply at the scope of the business necessity defense alone. If one looks at all three parts, we hypothesized, there was not much change in the overall bottom line of results, since the connotation of necessity would be read back into the overall inquiry as the plaintiff proved that other alternatives existed, making the employer's rule "unnecessary." These observations might persuade us that *Wards Cove* was no significant change in the law were it not for one additional aspect of the *Wards Cove* holding: the Court also tightened up on the showing required of the plaintiff at the third stage of inquiry. It did this in two ways. First, it demanded that the plaintiff show not only that a proposed alternative displace fewer minorities, but also that the alternative is "equally effective as the [employer's] chosen hiring procedures" in promoting the employer's ultimate business goals.[63] Secondly, the Court added a cautionary psychological component to the trial court's consideration of alternatives: " 'Courts are generally less competent than employers to restructure business practices.' "[64]

It seems reasonably clear, therefore, that even if one looks at the overall three-part test involved in disparate impact cases, *Wards Cove* introduced a significant change in the analysis that favors the employer. Even if showing "business justification" is only somewhat less demanding than showing "business necessity," the relaxed standard will be satisfied more often. And at the next stage, the plaintiff will less often be able to show less drastic alternatives given the more demanding proof *Wards Cove* imposes on plaintiffs.

Evaluation of the Holdings

What is there to recommend the Court's approach in *Wards Cove*? If there was one problem with the old approach, it was that it tended to ask rather ethereal questions, such as whether the employer's goal was important, without providing a practical scale for measuring that interest. *Wards Cove*, by making it more likely that defendant's will prevail at their stage, shifts to the plaintiff the burden of presenting a real-world alternative, a workable alternative, to the employer's neutral rule. Thus *Wards Cove* tends to bring the academic, cloud-level focus of disparate impact analysis down to earth.[65]

Beyond this effect, there is an argument for the proposition that *Wards Cove* did little to alter disparate impact analysis. On its face, the shifting of the burden of persuasion to plaintiff should have little impact in Title VII cases. Persuasion burden is nothing more than a tie-breaker rule in areas of the law governed by the traditional preponderance of the evidence rule,[66] which also applies in Title VII cases.[67] By tie-breaker, civil proceduralists simply mean that when the evidence is in equipoise, that is, when the factfinder cannot decide whose version of the truth to believe, the party with the persuasion burden loses.[68] Theoretically, therefore, the shifting of the persuasion burden to plaintiffs on all issues in disparate impact cases should only affect those rare cases in which the evidence is evenly balanced.

Similarly, on its face, the marginal redefining of the business necessity defense into business justification, even if one also includes the changes made to less-drastic-alternatives analysis, should make no huge difference in Title VII law. Few courts literally demanded that employers show that there was no available alternative to their challenged neutral rule.[69] In reality, outside the area of scored tests that had a discriminatory impact,[70] courts undertook a balancing approach that somewhat subjectively balanced business needs against the harm done to plaintiffs.[71] *Wards Cove* may be read as merely authorizing a continuation of that mid-level balancing.

Yet, while neither change in the business necessity defense, taken individually, seems very important, the two work synergistically to accomplish a substantial change in judicial tone that will probably greatly aid employers. Understanding this synergistic effect requires us to review disparate impact analysis as a whole. The doctrine works by having plaintiffs show that a cognizable social group is being underutilized by employers: that is a presumptive social harm, and our civil rights goal is to prevent the

systematic underinclusion of these people in the national economy. On the other hand, maintaining the efficiency of the national economy, as reflected in the business justification defense, is also a strong social interest. Disparate impact analysis balances these two social goals — civil rights and economic efficiency.[72] But what weight should be given to each of these concerns when both are important?

The old idealized business necessity defense — the one that never in fact existed, called for economic concerns always to lose unless an employer could show that its rule was the most narrowly formulated rule necessary to keep the business alive. The Supreme Court had already backed away from that position, but *Wards Cove* stepped back a bit further, so that we are now at the point of deciding on a somewhat equal plane which is more important, the plaintiff's needs or the employer's needs, civil rights goals or economic goals. This essentially calls for *ad hoc* balancing from a judge in each individual case, and presumably many of the actually litigated cases will involve situations where there are reasonable arguments for both sides, cases that are somewhat difficult to decide.

At this point, the new burden-of-persuasion rule adds its synergistic effect. Ordinarily, equipoise relates to the process of fact-finding and describes the situation where two competing versions of facts are in fine balance.[73] But as we saw in the previous paragraph, equipoise for disparate impact purposes has little to do with competing facts, and much to do with competing valuations of civil rights and economic goals. Moreover, since neither value is a clear winner under the Court's new middle-level test, more cases will appear to the judge to be in equipoise. These will then be decided against the plaintiff under *Wards Cove's* new burden of persuasion rule. It is this simple: the change in the definition of business necessity to a more mid-level inquiry will result in more cases appearing to be evenly balanced; the change in the persuasion burden will mean that these evenly balanced cases, many of which previously went against the employer, will now be decided against the plaintiff.

New Developments in Disparate Treatment Analysis: Subjective Hiring, The Mixed-Motive Defense, and Affirmative Action

Subjective Hiring and the Wards Cove and Watson Cases

The Holdings

In the 1987-88 Supreme Court term, the Court decided its first case involving so-called subjective employment standards. The Court was to decide whether unascertainable subjective hiring criteria were to be treated as neutral rules subject to the disparate impact test, or whether such cases could only be brought as disparate treatment claims in which plaintiffs would be required to prove intent to discriminate. In *Watson v. Ft. Worth Bank & Trust,* [74]a split majority held yes and no. Writing for a majority, Justice O'Connor ruled that disparate impact analysis was appropriate because of the danger that subjective hiring criteria could act exactly like objective criteria to exclude minorities from employment opportunities. But, having lost votes that dropped her to only a plurality, Justice O'Connor added that disparate impact analysis could only be used if it was amended to include "fresh" new rules that would require the plaintiff

> [1] to "isolat[e] and identif[y] the specific employment practices" that led to statistical underrepresentation of his group, and
>
> [2] to "show that the practice in question has caused" the underrepresentation revealed in the statistical evidence.[75]

Still speaking only for a plurality, Justice O'Connor further added that in such subjective hiring cases an extra consideration would be attached to consideration of the business necessity defense: the assumption that "many jobs, for example, those involving managerial responsibilities, require personal qualities" that cannot be objectively measured. This "self-evident" truth would satisfy the business necessity defense.[76]

In last year's *Wards Cove* decision, the *Watson* plurality ripened into a majority. Justice White's majority opinion in the latter case not only cited O'Connor's plurality opinion with approval,[77] it also applied her causation test to dismiss the plaintiffs' claims. Plaintiffs, said Justice White,

> even if they can show that non-whites are underrepresented in the at-issue jobs, ... will also have to demonstrate that the disparity ... is the result of one or more of the employment practices that they are attacking here, *specifically showing that each challenged practice* has a significant disparate impact.[78]

Evaluation

If the Court in *Watson* held that disparate impact analysis can be used in cases involving subjective hiring, one might rationally ask why I have chosen to include these cases in a discussion of developments in disparate treatment cases. It is because the "fresh" additional rules adopted in O'Connor's opinion effectively make it extremely unlikely that any of these cases can be tried as disparate treatment claims. The true import of *Watson,* as adopted in *Wards Cove,* appears when one compares this line with the cases that it superficially "overturned."

Watson appeared to overrule a line of Fifth Circuit cases flowing from that court's opinion in *Pouncy v. Prudential Life Insurance Co.*[79] In that case the Fifth Circuit held that disparate impact analysis cannot be used to attack subjective hiring practices — the opposite of *Watson's* apparent holding. But *Pouncy* announced a two-factor exception, permitting impact analysis when plaintiffs could (1) "isolate" and "identify" the point in the hiring process and (2) where they could show that their underrepresentation had been "caused." *Watson,* therefore, does not overrule *Pouncy;* it merely restates *Pouncy's* rules in affirmative language rather than noting exceptions.

What is the motivating force behind the *Pouncy / Watson* "fresh" rules? O'Connor in *Watson* and White in *Wards Cove* tell us that their major worry is that using traditional disparate impact analysis would encourage the use of quotas. This is because the business justification defense is difficult or costly to prove. When an employer sees that its overall hiring practices are resulting in underrepresentation of minorities — a fact that would allow plaintiffs to establish a statistical case against the employer, some employers might choose to eliminate the disparity through adoption of a quota. The "fresh" rules make it more difficult for plaintiffs to prove their statistical cases and thus make it unnecessary for an employer to adopt a quota as a defensive measure.[80]

Yet there is also a more fundamental factor at work here. If one looks at the Court's earlier disparate impact cases, all in fact met the Court's two "fresh" rules, because all involved identifiable hiring tests about which exclusionary data had been gathered. In this sense *Watson's* "fresh" rules were not new at all; allowing impact analysis to be used *without* the two rules would have been the new development. So-called subjective hiring, therefore involves different concerns than those seen in traditional disparate impact cases for the simple fact that no specific neutral hiring standard can be identified or tested.

Watson and *Wards Cove* effectively hold that so-called subjective hiring cases are really not impact cases at all, but disparate treatment cases. Why that is fundamentally true can be seen if we strip away the label "subjective hiring" and look transactionally at the plaintiffs' evidence. In such cases plaintiffs present comparative statistics about the employer's overall hiring results. Such evidence is often labeled "bottom-line" statistics because they show in gross the sum of all stages of the hiring process, not the exclusionary impact of any particular hiring factor. In *Connecticut v. Teal*[81] a liberal majority rejected "bottom-line statistics" when the employer raised them as a defense. The employer admitted that its hiring test had a discriminatory impact, but it argued that enough blacks had been hired anyway, pursuant to an affirmative action plan, to make the comparative statistics come out even at the bottom line. The liberals noted that impact analysis was concerned with discriminatory hiring practices, not overall hiring results. *Wards Cove* is true to the *Teal* holding.

Society's real concern with subjective hiring tests is that they mask intentional discrimination, as employers subjectively stereotype black applicants as unskilled, women as weak,

etc. That real concern with stereotyping is a concern with residual intentional discrimination, the focus of disparate treatment analysis — a form of analysis that has been successfully used in both individual and class actions to redress stereotyping. The fundamental factor at work in *Watson* and *Wards Cove,* therefore, is the simple distinction between disparate impact analysis and disparate treatment analysis. The Court is telling the dissenters that they are mistakenly trying to make impact analysis do treatment analysis' work.

The Mixed Motive Defense in Disparate Treatment Cases: The Price Waterhouse Case

The Holding

While the Court has long held that plaintiffs must prove that defendants acted with a racially (or other forbidden) discriminatory motive or intent in order to prove their disparate treatment claims, it has also recognized a defense for employers in cases in which they acted with mixed motives, one forbidden by law and one not. Grounded in the proximate cause principle, the defense operates to protect a defendant from liability where it concededly acted against plaintiff for an impermissible reason, but also acted for a separate and independent reason. The theory is that since there was a separate and independent reason that would have caused the plaintiff to lose his job, the prohibited intentional discrimination was not the cause of his job loss. In the constitutional law, where this doctrine was originally developed, the seminal case excuses an employer from liability if it can show that it not only fired a teacher for exercising his free-speech rights, but also because he was a bad teacher.[82]

As the great architect Mies van der Rohe once said of his discipline, "God is in the details," and so it is with the mixed-motive defense. The original constitutional law case, *Mt. Healthy School District Board of Education v. Doyle,*[83] placed the burden of proving this defense on the employer, and a subsequent constitutional law case also strongly hinted that *post hoc* reasons would not be accepted. In order to prevail with a mixed-motive, the defendant would need to show that its legally permissible reason was one on which it actually acted at the time of the original decision — not a reason later discovered or manufactured.[84]

In *Price Waterhouse v. Hopkins*,[85] the Supreme Court last year reaffirmed the mixed-motive defense. Interest in the case arises from the fact that the Court refused to change the burden-of-proof rules as it had in *Wards Cove* for the business necessity defense. Both the burden of production and the burden of persuasion remain with the employer asserting the defense.[86] Justice Kennedy, who would have parsed the burdens and allocated them as in *Wards Cove,* argued that such cases present only one issue — whether the employer caused plaintiff harm — and insisted that the persuasion burden should rest throughout the case on the plaintiff.[87]

Only Justice O'Connor, who joined the majority in *Wards Cove,* wrote to explain why the cases were different. In rather direct terms, Justice O'Connor pointed out that *intentional* discrimination, the kind banned by disparate treatment analysis, was a more serious social evil than impact-style discrimination. She thought that it ought to be more difficult for defendants to excuse themselves from liability when plaintiff had proved that such discrimination had tainted the employer's decisionmaking process.[88]

Evaluation

Justice Kennedy, in dissent, argued that the burden-of-proof allocations developed in the *Burdine*[89] case for individual disparate treatment claims should serve as a model for the mixed-motive defense. Since under that modeling the employer receives only a production burden, while the persuasion burden remains with the plaintiff, that is how he would have allocated burdens here.[90] The quick and pertinent rejoinder to Kennedy is that the *Burdine* rules apply at that stage of the case where plaintiff is presenting circumstantial evidence to prove intent. In the mixed-motive situation, such intent has by definition already been proven.

Justice Kennedy could have pressed with a rejoinder. As the Court said in *Wards Cove,* plaintiff must also prove causation, so that in the mixed-motive area plaintiff would need to prove not only intent but also causation — that the discriminatory intent, not other factors, caused

plaintiff's job loss. As a matter of logic, Kennedy's position is hardly assailable, which makes it more likely, as O'Connor noted, that the full Court was acting for essentially policy-based reasons. In addition to those expressed by O'Connor, I suggest that *Price Waterhouse* shows some dissatisfaction with the very existence of the mixed-motive defense. It may be logically true that where defendant acts with mixed motives, the plaintiff would have lost his job notwithstanding the intentional discrimination; moreover, to give plaintiff relief might indeed reward him despite his incompetence. Nevertheless, there is something objectionable about allowing an admitted discriminator to go free. The law misses an opportunity to deter such conduct, to educate society against the evils of intentional discrimination.

By placing the persuasion burden on the employer in mixed-motive cases, the Court has created a classic "bad man" rule. As an admitted wrongdoer, the employer who acted for mixed motives must run the risk of losing his case when the evidence is in equipoise. This mere "procedural" rule accomplishes a substantive goal by making the mixed-motive defense less helpful to defendants, by making it riskier to assert, and by making it likely that some employers will lose through lack of proof even though they indeed possessed mixed motives. The procedural burden-of-proof rule, in short, is a means by which a skeptical Court keeps a worrisome defense on a short leash.[91]

Voluntary Affirmative-Action Plans and the Croson Decision

The Holding

For some years a scant Supreme Court majority kept alive its vision of voluntary affirmative action, a vision that encouraged such plans by making it relatively easy for employers to justify their race-conscious plans as remedies for prior racial discrimination. In the original case, *Steelworkers v. Weber*,[92] the Court ensured such a result by adopting rules for proving past discrimination that were quite relaxed. Proof that the job at issue was a "traditionally segregated job" was deemed adequate, even though others than the immediate employer had committed the prior discrimination.[93] Three years ago in *Johnson v. Transportation Agency*,[94] Justice O'Connor, in a concurring opinion, proposed a new approach for proving the connection between past discrimination and present-day affirmative action, an approach that emphasized statistics as evidence of an employer's own prior discrimination.[95] Last term, in a related constitutional law case involving affirmative action, a full majority adopted Justice O'Connor's position.

The new decision, *City of Richmond v. J. A. Croson Co.*,[96] involved voluntary minority set-asides adopted by a local government,[97] but the Court, with Justice O'Connor writing the opinion, made clear that it was adopting the author's wide-ranging rationale from the *Johnson* case.[98] In *Croson* the Court noted that in order to show that a particular affirmative action plan was remedial of prior discrimination, the defendant would need to demonstrate a "factual predicate" for such discrimination.[99] In the employment context that predicate would be the employer's own discrimination.[100] Although there might be several ways to establish such a factual predicate, the *Croson* Court foresaw the usual way[101] as statistical proof of a "prima facie case" of intentional discrimination, as set out and approved in *Bazemore v. Friday*.[102]

The Court must have known that the *Croson-Johnson* approach would make it more difficult for employers to defend affirmative action plans. When the old majority originally decided the *Weber* case, Justice Blackmun explicitly considered and rejected the prima-facie-case approach to establishing past discrimination.[103] The approach, which had been suggested in an earlier law review article,[104] subjects an employer to greater economic risks because proof of the employer's own prior discrimination not only justifies the plan at issue, it also exposes the employer to liability for backpay due the plan beneficiaries.[105] Thus, the more rigorous evidentiary rules adopted in *Croson* raise the potential cost of implementing a quota-based plan.[106]

Evaluation

Although there was an arguably substantive change from *Weber* to *Croson* — from focusing on general societal discrimination by all employers to identified discrimination by the employer that had adopted the challenged plan, *Croson's* procedural change — requiring proof through the methods of the statistical prima facie case — could be more important in the long run. There is the problem of increased potential

liability, as the courts themselves had previously recognized, but there are also added procedural or litigational costs. Under the *Weber* approach, all one needed to justify a plan was a set of cases showing findings of past discrimination in similar jobs.[107] That is, a basis for believing that the jobs were traditionally segregated. Under *Croson*, on the other hand, an employer will need to hire a statistical expert who will need access to past applicant flow data and a good deal of time to analyze such information to determine if it is sufficient to raise an inference of discrimination.[108] Thus, the procedures for proving past discrimination are so costly that they will likely retard all but committed employers from adopting affirmative action plans.

There is, moreover, the problem of timing, even for apparently committed employers. A risk-averse employer will, no doubt, prepare its justifying plan in advance of litigation. The delay in implementation will probably prompt reconsideration of the plan as the expert's work moves along. And in any event, the statistical data produced by the expert will place limits on the quota that might ultimately be adopted, probably revising downward what might have otherwise been chosen.[109] The procedural incidents of *Croson*, therefore, reinforce and accentuate the Court's overall goal of reducing employers' reliance on quotas.

Conclusion

While much of last year's new employment caselaw came wrapped in the language of procedure and burdens of proof, those decisions actually reflected and furthered underlying substantive concerns. Some might say that judges always use talk of process to disguise their substantive goals, but my point is that judges act with more sophistication than that. They can use procedural rules to bend, shape, amend, or attenuate an apparently substantive rule, thereby creating a package of ultimate liability that is more effective and precise in carrying out the majority's chosen social policy.

So it was last year with Title VII.

END NOTES

1. Civil Rights Act of 1964, 78 Stat. 253, codified at 42 U.S.C. §2000e *et seq.*

2. *See City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989) (equal protection claim involving quotas).

3. *See, e.g.*, 42 USC §2000d(Title VI), *NAACP v. Georgia*, 775 F.2d 1403, 1422 (11th Cir. 1985) (impact test applies). For examples of other legislation using the impact test, see S. Shulman & C. Abernathy, The Law of Equal Employment Opportunity §§ 12.05, 14.01 (Warren, Gorham & Lamont 1989).

4. *See, e.g., Brown v. Western Ry.*, 338 U.S. 294 (1949) (substance+procedure package in law cannot be split apart) (standard case in first-year civil procedure books).

5. In Manchu China the central government wished to encourage private, informal dispute resolution and sought to deter its citizens from using the courts as a vehicle for enforcing formal law. Accordingly, the government adopted the practice of levying ruinous fees and entertainment expenses on all litigants — plaintiffs and defendants — when they appeared in court. This procedural device markedly restricted the scope of the legal code supposedly applicable in the courts. *See* S. van der "Sprenkel, Legal Institutions in Mancho China, ch. 9

6. *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (recognizing the two different forms of analysis).

7. *See, Zahorik v. Cornell University*, 729 F.2d 85 (2d Cir. 1984) (skill in scholarship relevant to teaching).

8. *See* Shulman & Abernathy §3.07[3]. *Cf. Mt. Healthy School District Board of Education v. Doyle*, 429 U.S. 274 (1977) (defense originally created in teacher discharge case).

9. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 27=67 (1986) (school board's adoption of affirmative action plan that lays off senior whites first is unconstitutional).

10. 109 S. Ct. 2115 (1989).

11. *Id.* at 2119, citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

12. *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425 (1977).

13. *See* Shulman & Abernathy § 2.05[1].

14. 109 S. Ct. at 2119-20.

15. 810 F.2d 1477 (9th Cir. 1987) (en banc), on remand, 827 F.2d 439 (panel reconsideration).

16. *Dothard v. Rawlinson,* 433 U.S. 321, 329-30 (1977).

17. *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975).

18. *Id.* at 425. Some cases compare "inclusionary" rates rather than exclusionary rates, but the former are simply the inverse of the latter. For example, a 90% exclusionary rate is the inverse of a 10% inclusionary rate.

19. *Wards Cove Packing Co. v. Atonio,* 109 S. Ct. 2115, 2121 (1989).

20. 109 S. Ct. at 2122.

21. I shall sue "blacks and whites" in order to simplify the discussion, but Title VII and its analogues also other cover other bases of discrimination in addition to race. *See, e.g., Western Air Lines v. Criswell,* 472 U.S. 400 (1985) (ADEA case, age discrimination).

22. *See id.* at 2123; *Connecticut v. Teal,* 457 U.S. 440 (1982); *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975).

23. 109 S. Ct. at 2122.

24. *See* 42 USC § 2000e- 2(j).

25. 109 S. Ct. at 2123.

26. *See New York City Transit Auth. v. Beazer,* 440 U.S. 568 (1979) U.S. (surrogate class of all persons at public drug rehabilitation centers does not accurately approximate class of all qualified potential applicants for jobs with transit agency); *Dothard v. Rawlinson,* 433 U.S. 321 (1977) (in case challenging height and weight standards in state employment in Alabama, plaintiffs may use data calculated on entire U.S. population, not just on Alabama residents, because class of all U.S. citizens closely approximates class of residents of Alabama).

27. 109 S. Ct. at 2123.

28. *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975).

29. 108 S. Ct. 2777 (1988).

30. *See* Shulman & Abernathy § 2.04[2][d].

31. 108 S. Ct. at 2789 n.3 (ellipsis in original).

32. 108 S. Ct. at 2791-97.

33. *See* Shulman & Abernathy { 2.04[2].

34. *Cf. Washington v. Davis,* 426 U.S. 229, 246 n.14 (1976).

35. *See* 42 U.S.C.§§ 2000e(b) & 200(e)-2(a).

34.a *See* text at note 21.

35.b *See* 109 S. Ct. 2120 n.4 (majority criticizing dissent).

36. This is a traditional liberal role for impact analysis. Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. (1970).

37. *See Griggs v. Duke Power Co.,* 401 U.S. 424, 432 (1971).

38. There is some indication that this trend may already be starting. *See Watson v. Ft. Worth Bank & Trust,* 108 S. Ct. at 2789 (appearing to equate impact analysis and intentional discrimination).

39. *See Whitley v. Albers,* 475 U.S. 312 (1976) (§1983 case).

40. *See* Shulman & Abernathy §3.06[1]-[3].

41. *Id.* at 3.06[1].

42. *See infra* text at note (business necessity defense).

43. *See* Shulman & Abernathy § 3.06[3][e].

44. *See* text at note 24.

45. *See* Shulman & Abernathy, § 2.02.

46. *Griggs v. Duke Power Co.,* 401 U.S. 424, 432 (1971).

47. *See. e.g., Williams v. Colorado Springs School District No. 11,* 641 F.2d 835 lOth Cir. 1981).

48. 109 S. Ct. at 2126.

49. *Id.*

50. *Id.*

51. *See* Shulman & Abernathy, at §§ 3.05[3] & 3.06[4][b][i].

52. 109 S. Ct. at 2130-31 (Stevens, J., dissenting) (4 votes).

53. *Id.* at 2131.

54. *See Price Waterhouse v. Hopkins,* 109 S. Ct. 1775 (1989), discussed *infra.*

55. 109 S. Ct. at 2126.

56. *Washington v. Davis,* 426 U.S. 229 (1976).

57. 401 U.S. at 431 (emphasis added).

58. 440 U.S. 568, 587 n.31 (1979)

59. 109 S. Ct. at 2128.

60. *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425 (1975).

61. *See* Shulman & Abernathy, §2.06[1][b].

62. 109 S. Ct. at 2126-27.

63. *Id.*

64. *Id.* at 2127, quoting *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 578 (1978) (a disparate treatment case in which intent had not been proved).

65. For pre-*Wards Cove* cases that undertake such real-world inquiries, *see* Shulman & Abernathy, §2.06[1][b], citing, e.g., *Horace v. City of Pontiac,* 624 F.2d 765 (6th Cir. 1980).

66. *See* 9 J. Wigmore, Evidence §§2485-89 (1981 ed.).

67. *See Price Waterhouse v. Hopkins,* 109 S. Ct. 1775, 1792 (1989).

68. *See,* Shulman & Abernathy, § 3.05[3][a].

69. *See id.* at §2.05[5].

70. *Id.* at §2.05[4].

71. *Id.* at §2.05[5].

72. *Id.* at §1.01[2][c].

73. *See, e.g., Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981) (*prima facie* case rules for determining single factual issue of intent in disparate treatment cases).

74. 108 S. Ct. 2777 (1988).

75. *Id.* at 2788 (bracketed numbers added for clarity).

76. *Id.* at 2791.

77. 109 S. Ct. at 2124: "The law in this respect was correctly stated by Justice O'Connor's opinion" in *Watson,* quoting O'Connor's isolate-and-identify language.

78. *Id.* at 2125 (emphasis added).

79. 668 F.2d 795 (5th Cir. 1982).

80. *See Watson v. Ft. Worth Bank & Trust Co.,* 108 S.Ct. at 2788; *cf. Wards Cove Packing Co.,* Inc. v. Atonio, 109 S.Ct. 2124-25 (citing *Watson* plurality, but referring more obliquely to "statistical imbalances").

81. 457 U.S. 440 (1982).

82. *See* Shulman & Abernathy § 3.07[3].

83. 429 U.S. 274 (1977).

84. *See Hunter v. Underwood,* 471 U.S. 222 (1985) (present-day neutral reason will not suffice to justify admittedly discriminatory prior classification).

85. 109 S. Ct. 1775 (1989).

86. *Id.* at 1789-90.

87. *Id.* at 1806-14.

88. 109 S. Ct. at 1798, 1800-02, 1804.

89. *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

90. *Id.* at 1810.

91. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983) ("wrongdoer" should "bear the risk" that court will be unable to separate legal and illegal motives).

92. 443 U.S. 193 (1979).

93. *Id.* at 207 n.7, 208. *See Fullilove v. Klutznick*, 448 U.S. 448 (1980) (split majority relies in part on same rationale to approve constitutionality of federal contract set-asides for minorities).

94. 480 U.S. 616 (1987).

95. *Id.* at 651-52.

96. 109 S. Ct. 706 (1989).

97. *Id.* 712-717.

98. *Id.* at 725 (relying on O'Connor's opinion in *Johnson).*

99. *Id.* at 723.

100. *Johnson v. Transportation Agency*, 480 U.S. at 651 (O'Connor, J., concurring).

101. 109 S. Ct. at 726, 729.

102. 478 U.S. 385, 386, 397-404 (1986) (*per curiam* opinion adopting opinion of Brennan, J., on this issue).

103. 443 U.S. at 209-216 (Blackmun, J., concurring).

104. *See,* Comment, *Race Quotas,* 10 Harv. C.R.-C.L. L. Rev. 128 (1973).

105. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (backpay award is ordinarily to be granted to class members after proof of class-wide discrimination).

106. It is true, of course, that the *prima facie* case only raises the inference of intentional discrimination and does not conclusively prove it. *See* Shulman & Abernathy §3.06[4][b]. On the other hand, rebuttal of such proof is somewhat difficult, *see id.* at §3.06[4][b][ii], and, moreover, it would be incongruous to have the employer prove the *prima facie* case to justify the plan, only to force it later to rebut the *prima facie* case in order to avoid backpay liability to any intervening beneficiaries of the plan.

107. *See Steelworkers v. Weber*, 443 U.S. at 198 n.l (citing such cases for such a purpose).

108. *See* Shulman & Abernathy at § 3.06.

109. *See City of Richmond v. J. A. Croson Co.*, 109 S. Ct. at 728.

SPECIAL EDUCATION LITIGATION: THE PREPARATION & TRIAL

John P. Heil
Baird, Holm, McEachen,
Pedersen, Hamann & Strashiem
Omaha, Nebraska

INTRODUCTION

This article addresses the practical aspects of representing a school district in special education litigation. It is important to approach these cases with an understanding of the sympathy that a hearing officer or judge naturally has for the parents of a handicapped child who may never fulfill even the most basic parental expectations. Often the parents are under-going an extended grieving process which may be manifested, in part, through the litigation.

The challenge for school attorneys is to portray their clients sympathetically by demonstrating the extraordinary difficulty which a serious handicap poses to the educational process as well as the considerable talent and substantial resources which the school has brought to bear on the problem.

The hearing or trial should function as a mini-seminar to help the judge or hearing officer comprehend the implications of the handicapping condition for the child and the school. By avoiding a "poor boy" approach and by advocating for the handicapped child, it is possible to wear the "white hat" in special education litigation.

DOCUMENTARY EVIDENCE

The first step in preparing for special education litigation is to promptly assemble and review every document in the school district's records pertaining to the handicapped student. Some records, such as reports of evaluations and Individual Education Plans, (IEPs), have obvious significance to the case, but crucial information is often found in other documents which are easily overlooked. Attendance records, for example, may disclose a pattern or accumulation of absences which would interfere with any child's educational performance, whether or not the child was handicapped. The student's health or nursing records may disclose illnesses, medications or other physical conditions such as ear infections or vision problems not mentioned in the IEP or multidisciplinary evaluations but which may have a considerable impact on the child's ability to benefit from his or her educational program.

Other records of importance in the school's files are correspondence and records of telephone calls to and from the parents. These documents often show the considerable effort undertaken by school personnel to respond to parental concerns as well as the parents' manner of dealing with the child's problems and of responding to the concerns of the school's staff about the child. At minimum, these records can undermine opposing counsel's attempts to make the complaining parents appear to be the "victims" of a heavy-handed and uncaring school bureaucracy.

Samples of the student's papers may also be contained in the school records. These are helpful to a hearing officer or judge in understanding the nature of the limitations imposed by the child's handicap, and they demonstrate the earnest efforts by school staff to address the child's deficiencies. Representative samples of school papers also may illustrate the child's progress over the course of one or more school years thereby defusing claims of regression or lack of educational benefit.

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The review of the assembled documents should be conducted jointly by the school's attorney and a knowledgeable staff member who can explain each document's origin and significance.

The documents can then be arranged in chronological order, tabbed, indexed and copied for an exhibit binder. Pages within tabs can be numbered for easy reference. An appropriate evidentiary stipulation is then prepared and submitted to opposing counsel with a copy of the exhibit binder. If the exhibit binder contains all of the school's records regarding the handicapped child, opposing counsel normally will forgo an examination of the school's records that can be time-consuming and disruptive for the staff.

There is, obviously, a danger that preparation of the complete exhibit binder will operate to the disadvantage of the school by disclosing procedural deficiencies which otherwise may have been overlooked by opposing counsel. This disadvantage is outweighed, however, by the convenience of having a single, comprehensive exhibit binder for use in preparing witnesses and for reference at the hearing or trial. As previously noted, items in the student's records which seem insignificant at the outset of the case often become important later as new issues develop in the proceedings. It is also likely that opposing counsel would conduct a diligent review of all of the student's records and discover any procedural deficiencies even if the exhibit binder were not produced. Finally, the school attorney can avoid surprise at the hearing or trial if he or she has mastered the entire record and is prepared to address any procedural claims or other alleged deficiencies.

Extra copies of the exhibit binder should be prepared to allow the school's witnesses to refresh their recollection and prepare for the hearing. Outside expert witnesses also benefit by having a copy of the exhibit binder for review well in advance of the hearing. The original records remain in the school's files and are available on a daily basis to the staff serving the handicapped student during the pendency of the proceedings.

DEMONSTRATIVE EVIDENCE

The old adage that "a picture is worth a thousand words" is particularly applicable in special education litigation. Hours of testimony by expert evaluators, teachers, therapists or parents do not provide the same understanding about the child and his or her educational program that is obtained through observing the child in his or her classroom setting even if only for a few minutes. Since it is usually impractical to take the hearing officer or judge to the classroom, a video recording can be used to substitute for first hand observation. Whenever a special education dispute is on the horizon, schools should make it a practice to videotape the student in the classroom setting if such taping is not regularly conducted to evaluate the instructional program. The videotape can be authen-ticated at the hearing or trial by the person who operated the camera or, preferably, by the teacher or therapist whose instruction was recorded.

Given the limited patience of most hearing officers and judges, a good practice is to offer two tapes into evidence. The first is an unedited tape consisting of several instructional sessions lasting up to fifteen or twenty minutes each. The second is an edited tape consisting of selected segments from the first tape but having a total duration of no more than ten to fifteen minutes. The second tape is played at the hearing or trial during the testimony of the teachers or therapists shown on the tape who explain what is taking place. The unedited tape is available to show what was edited, but usually is not played. It also may be possible to duplicate both tapes on a single cassette, with the edited version appearing first.

Videotape evidence is particularly critical if the parent obtains expert witnesses who seek to create an unrealistic picture of the child or who attempt to belittle the school program's efforts to educate the student. A videotape also helps a hearing officer or judge to comprehend the extraordinary difficulty inherent in educating a child with one or more serious handicapping conditions. The videotape is often the most influential exhibit in special education litigation. The importance of videotape exhibits to school district defendants is illustrated by the fact that they are rarely offered in support of the parents' case.

WITNESS SELECTION AND PREPARATION

The selection of witnesses to testify on behalf of the school district depends, of course, on the issues raised by the complaint. Because parties

at due process hearings are not strictly limited by their pleadings, the focus of the attack will often change as the facts develop through the course of such hearings. Thus, it is best to prepare for all eventualities in selecting hearing witnesses.

Classroom Teacher or Therapist

Just as the videotape of the child in his or her educational setting is usually a key exhibit, the classroom teacher or therapist is often the most important witness presented on behalf of a school district defending its placement or IEP. Among the witnesses available to the school, the classroom teacher or therapist is the most familiar with the child and demonstrably has the child's best interest at heart. Moreover, cross-examination of a classroom teacher or therapist usually is not searing.

Hearing officers and judges tend, though not expressly, to base their decision on whether they would want their own child, if similarly handicapped, to be educated by the classroom teacher or therapist who has testified. Procedural issues such as proper identification, least restrictive environment, or the measurability of IEP objectives, become far less significant if the hearing officer or judge has confidence in the ability of the teacher or therapist to provide a program that will benefit the child. Even if the teacher or therapist has not seen the child and is merely part of a disputed placement proposal, this testimony remains a critical part of the school district's case.

Other School Staff

Additional witnesses for the school may include staff or outside evaluators, consultants, supervisors and administrators who have participated in the multi-disciplinary evaluation process, IEP meetings, the placement process or who have observed and supervised the provision of special education and related services to the pupil. Consideration should also be given to use of educators who serve the student in "mainstream" classes or who observe the student and his or her interaction with other students at the school. These staff members share the enthusiasm and concern of the special education teacher or therapist for the handicapped child, and it is important to convey the atmosphere of the entire school to the hearing officer or judge.

In selecting witnesses from the school staff, there frequently will be some overlap of knowledge or experience with the handicapped student. For example, the child may be served by several special education teachers, therapists or "mainstream" teachers, or the child may have been tested by several psychologists. Such overlaps provide the school attorney with an opportunity to select the witnesses who will be the most effective on the witness stand in "selling" their school and program or in articulating their evaluative findings and recommendations.

Assuming a prospective school witness has a good reputation for being articulate and is impressive in an individual interview with the school's attorney, it is not uncommon for such persons to lose all confidence when confronted with a hearing or trial situation. Similarly, witnesses who are very reticent or reluctant during an initial interview with the school's counsel can become extremely articulate and effective witnesses at the hearing or trial. Experience has shown that the effectiveness of a school witness usually is related directly to the nature and amount of preparation of the witness prior to the hearing or trial.

Initial Witness Meeting

Most school personnel have never testified in any kind of hearing or litigation, much less a special education case.

Moreover, they are accustomed to resolution of educational disputes through consensus in staff meetings, not through an adversary system. Thus, the first step in witness preparation is to conduct a group meeting with the staff members likely to testify on behalf of the school district as well as those who potentially may be called by the opposing party.

It is essential that the school administrator responsible for the case call this meeting and be present. The preparation of and participation in the defense of a special education case will entail substantial stress and toil. The staff must understand the expectations placed upon them, the importance of the case to the child and the school district, and that the attorney's presentation represents the position of the school district.

The staff should be briefed on the hearing or trial process in general and provided with a witness brochure generally applicable to trial proceedings. In addition to the usual admonitions, there are several points rather unique to

special education litigation that should be presented to the staff witnesses as a group.

The first and the most important point is that the school staff members are not "on trial" in the proceedings. The special education proceeding is not a malpractice trial, and there will be no finding of fault or neglect. The purpose of the hearing or trial is to determine what is in the best educational interest of the handicapped child. Since the school and the parents are at loggerheads, it is the role of the hearing officer or judge to resolve the dispute. The ultimate winner or loser in this case is the child, since it is his or her educational program that will be effected by any ruling. While being called to testify under oath and being subjected to cross-examination may not be anyone's favorite pastime, it is the staff's duty to testify to help protect the child's educational interest.

The second point is that they are the experts on the educational issues and that they know far more about these matters than the parents, the attorneys, the hearing officer or the judge. Their role is to explain how their expertise has been applied to meeting the educational needs of the handicapped child. Since the hearing officer or judge is a "lay" person or "consumer" with respect to education, they must testify in nontechnical terms as much as possible, use repetition and concrete examples, and otherwise respond to questions as if they were being asked by a student's parent, not a curriculum supervisor or a college professor. A corollary to this proposition is that the witness should make no assumptions regarding questions incorporating educational terms of art. An example would be the term "regression." If a questioner uses such terms, the witness may ask how the questioner defines the term.

The third point relates to the role of the parent's attorney. The school's witnesses should understand that the opposing attorney will advocate the parental point of view, whether or not that is in the best interest of the child, because the parents are the attorney's clients. In all likelihood the opposing counsel has spent little if any time with the handicapped child and knows only what he or she has been told by the parents or their experts. Given this role, the school's witnesses should neither be surprised by the questions asked nor influenced by opposing counsel's reactions to their answers (which may take the form of encouragement, sarcasm, disbelief, mirth or sorrow), anymore than they would react to such histrionics on the part of a parent.

The fourth point to convey to the school witnesses is that how they respond is just as important as what they say while they are on the witness stand. They should focus on being attentive, providing thoughtful and direct responses, and on avoiding defensiveness. While they are the experts in educational matters, any righteous indignation may be perceived as arrogance or callousness. It is important, however, that they take pride in and show enthusiasm for their program and school without being boastful.

Individual Witness Interview

After meeting with the school's witnesses as a group, it is important to meet with each witness individually to review the witness' knowledge and personal view of the matter, to refresh recollection through the exhibits, to provide the questions to be asked on direct examination and those that are anticipated to be asked on cross-examination, and to address any individual concerns or apprehensions the witness may have. The school's attorney must be alert for any express or implied disagreement of the witness with the position taken by the school district and for any communication of such disagreement with the parents or their counsel. Alternatively, the witness may have a long-standing disagreement with the parents which could impact on the witness' credibility.

The witness should be reminded that any personal notes taken to the witness stand are subject to examination by the opposing counsel and the student's parents, even though they would not ordinarily be able to obtain access to those records. The witness should also be reminded that it is perfectly proper to discuss his or her testimony in advance of the hearing with the school's counsel and other school staff members. The witness should not hesitate to admit such discussions if asked on cross-examination.

If the witness will be testifying about an evaluation or assessment of the handicapped child, the witness should be directed to review the entire exhibit book of school records. Evaluation or assessment witnesses should be forewarned that if their testimony is critical to the school district's position in the case, opposing

counsel will probably attempt to characterize the evaluator as inept, biased, incompetent or arrogant so as to damage his or her credibility. The witness should be prepared to respond to questions alleging that the child was ill, under medication, not wearing his or her glasses, had an ear infection or otherwise was not up to par on the day of the observation or testing. Other questions typically put to evaluation and assessment witnesses on cross-examination relate to the justification for selection of the test instruments, whether or not the test instruments have been standardized on a handicapped population, and the meaning of various test scores which, to a lay observer, may suggest a conclusion different than that offered by the witness. The witness should familiarize the school attorney with the strengths as well as the weaknesses of the evaluative process.

If the witness is a teacher or therapist who has not previously served the student, but is proposed to serve the student, the witness should, if possible, have an opportunity to observe the student. This observation and a careful review of the documentary and demonstrative evidence available should assist the witness in testifying with assurance about how he or she would serve the handicapped child if the student attended the proposed program.

Outside Expert Witnesses

An impartial and incisive analysis of the educational issues by an outside expert witness may serve an important purpose in the presentation of the school district's case. Selection factors (in order of importance) include:

(1) extensive experience with the particular handicap or educational problem presented in the case;
(2) the ability to take a completely objective posture;
(3) the ability to provide an unembellished analysis of the child's handicapping condition and educational needs in very concrete terms;
(4) professional recognition within the witness' field; and
(5) prior experience as an expert witness.

While the holding of the most advanced degree available from a prestigious institution and the authorship of numerous articles or publications may be of interest to educators, hearing officers or judges are far more attentive to expert witnesses who provide an understandable explanation of the handicapping condition or education methodology that is at issue in the case. Whether such an outside expert is found at a nearby institution or comes from a distant locale is important only in calculating the travel expense.

An outside expert witness is particularly helpful when a school district is attempting to return a student from a contracted setting to its own program or refusing to pay for a parent-selected private placement. The expert can demystify the program offered at the contractual or private setting and provide assurance to the hearing officer or judge that the school district's proposed program will meet the needs of the handi-capped child. Similarly, the outside expert can be helpful if the central issue relates to projecting what may or may not happen if changes are made to the student's placement or IEP resulting in a reduction of services or if the school district refuses to carry out the parent's request for increased services. The outside expert can rely on his or her experience or on published research studies of handicapped children under similar circumstances to substantiate his or her opinions. An incidental but important benefit from using an outside expert is the assistance he or she can provide to the school's attorney in providing searching questions for cross-examination of the parent's expert witnesses to probe underlying assumptions about the child or the educational setting which may not be valid.

If there is a decision to bring in an outside expert, that person should be provided with the exhibit binder and the videotapes well in advance of the hearing. In addition, the outside expert should be brought in prior to the hearing to conduct an unannounced observation of the handicapped child in the classroom setting, afforded the opportunity to converse with the child's teachers, therapists and any classroom paraprofessionals, and taken to visit any educational program proposed for the child. These observational experiences are just as important for the outside expert as they are for the hearing officer.

If possible, the outside expert should be present for the testimony of all of the witnesses

to the point at which he or she testifies in the hearing or trial so that the expert's testimony is based not only on the expert's review of the exhibits and observation of the pupil, but also on all of the testimony provided at the hearing. This also allows the expert the benefit of hearing the questions propounded by the opposing counsel and the hearing officer or judge, and he or she is better prepared to address the specific concerns revealed by such questions.

HEARING OR TRIAL STRATEGY

School districts are typically respondents or defendants in special education litigation and thus do not have the burden of going forward. In certain cases—particularly those in which the parent is challenging a change proposed by the school district—there are advantages to assuming the burden of going forward. It is natural for the judge or hearing officer to expect to hear the evidence supporting the proposed change first, and the hearing tends to run more smoothly. This strategy also allows the school district to gain the benefit of the first impression and permits greater emphasis to be placed on the factors or witnesses the school district believes to be determinative of the issues. A drawback to this strategy is that it tends to shift the burden of proof to the school district, but this shift is likely to occur (if only subconsciously) in any event if it is the school district that has proposed the change.

In cases in which the parents are mounting a broadside attack on the school district's program in order to achieve some change, it may not be advisable to assume the burden of going forward on behalf of the school district. Often the issues have not been clearly defined prior to the hearing, especially if no discovery is available. A coherent response to the parents' case may not be possible until all of their evidence has been presented. It is also important to maintain the burden of proof on the parents in such cases.

The school district's case should be presented in a manner that paints a picture of the precise nature and severity of the child's handicaps, the unusual difficulties these handicaps pose for educators, and of the considerable talent and extensive resources that make up the child's educational program.

It is beneficial to elicit a brief summary of the pertinent education, certification, experience and other credentials from each school district witness even if the witness' vita is received into evidence and the opposing counsel is willing to stipulate that the witness is an expert. This short recitation often helps to build the witness' confidence and focuses the fact-finder's attention on the credentials which make the witness' testimony particularly helpful in the case.

If the case is a broadside attack on the program offered by the school district, it may be appropriate to open with the teachers or therapists who serve the child, followed by the other staff members including diagnostic and evaluative personnel who serve to confirm the teacher or therapist's testimony and the educational benefit being provided to the student. In instances involving disputes over changes proposed by the school district, it is usually helpful to begin with the testimony of the diagnostic or evaluative personnel. These witnesses should detail their testing and observation of the student, their finding, and their recommendations as they relate to the IEP, the placement, the educational methodology to be used and what the parents can do to help. The diagnostic or evaluative experts are followed by the classroom teachers and therapists who have served the child or who will implement the IEP and by the other school personnel who can testify as to observation of the student and the student's program.

If an outside expert witness is being used, this testimony is usually most beneficial close to the end of the school district's case-in-chief. The school attorney should not hesitate to solicit the outside expert's recommendations for improvements in the school's program or services for the student. The school district, of course, must be prepared to implement such recommendations, but they serve the important purpose of supporting the objectivity and independence of the outside expert.

In cross-examining the parent's expert witnesses, the school attorney should look for a lack of credentials, opinions beyond the areas of the witness' competence, and "windowdressing" of the child's ability, skills or potential or of the benefits or content of a desired educational placement at another institution. Expert witnesses for parents often testify or infer that education occurs only in the classroom or only at the hands of professional teachers or therapists. Since the child is typically "delayed" in his or her learning, it may be suggested that the intensive attention

of teachers or therapists is necessary for virtually 24 hours-a-day, 365 days-a- year, in order to "regain" lost ground.

In fact, education neither begins nor ends at the classroom door, and there are limitations on the effectiveness of continuous instruction. The school witnesses and any outside expert should be able to provide testimony concerning the amount of learning which occurs outside the classroom and the importance of the divergent experiences available to the student when school is not in session. The testimony of the school staff should show numerous attempts to advise and assist the parents in providing educationally important experiences outside of school. The school's witnesses should also be able to testify that the best education occurs for all students when school and parents work together. The child suffers only when either the parents or the school drop the ball.

CONCLUSION

The school's evidence should demonstrate how the staff has advocated for the handicapped student both in school and at home. This advocacy is manifested through the earnest testimony of the teacher or therapist as well as through an exhibit binder containing numerous letters, memos and reports to the parents relating to the child's educational program, homework, therapy and health needs. Such evidence demonstrating the staff's efforts to make the parents part of the educational process should place aggressive parents on the defensive and deny them the opportunity of depicting the school as a heavy-handed and uncaring bureaucracy.

PUBLIC SCHOOLS AND CONSTRUCTION FAILURE: PREVENTION, PROOF & RECOVERY

Lorence H. Slutzky
Robbins, Schwartz, Nicholas, Lifton & Taylor
Chicago, Illinois

INTRODUCTION

The Public School Board (the Owner) engages the architect. The architect, after conferring with the Owner and numerous consultants, prepares detailed plans and specifications. The Owner secures financing. Construction managers are engaged. Contracts are awarded. Sureties provide bid, performance, and payment bonds. Numerous contractors, subcontractors, materialmen, and laborers commence construction. Time lapses; quality is compromised. Ambiguities in the design documents are not promptly resolved. Costs escalate, the contractor and/or Owner is/are on the verge of insolvency, patience is exhausted, the deadline has not been met, and minor disputes have erupted into open warfare.

Construction projects commence with paper and end with paper. Every construction project compels an analysis of rights and liabilities of the architect, the contractor, the surety, and the institutions providing financing for the project. This paper addresses the rights and duties of the Owner. These contractual rights and duties arise out of the Owner-Architect and Owner-Contractor agreements. In 1987, the American Institute of Architects (A.I.A.) revised its standard forms of agreement. Both the current forms and their predecessors are currently in use. For purposes of reference and the convenience of the reader, the architect's contract is A.I.A. B141, and, where applicable, both the 1977 and 1987 editions are cited. The general contractor's contract is A.I.A. A201, and, where applicable, both the 1976 and 1987 editions are cited. Understanding the contract documents is essential to perfecting a potential claim against a party involved in the construction process. The A.I.A. Documents are but one example of standardized contracts.[1]

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THE DESIGN PHASE

Engaging the Design Professional

The relationship between the Owner and the architect is fundamentally the same kind of relationship that exists between any client and the contracting professional. The relationship between the parties is fiduciary in nature — one of trust and confidence. In choosing the design professional, an assessment of the professional's experience is a prerequisite. Whatever its size or scope, each project is unique. Unique problems may require specialists. The relationship is triggered by the Owner's perception of the integrity, experience, and education of the architect. The relationship between the Owner and architect is memorialized in a contract. The A.I.A. comprehensive contract documents have become one of the industry's standard documents. In any litigation, a version of this contract is likely to form the basis of the claim.

The boldface caveat on the A.I.A. contract should be heeded: "This document has important legal consequences; consultation with an attorney is recommended." If the Owner succumbs to "form mentality" and executes and delivers the contract to the architect, the die is cast. Leverage in negotiating with the architect is lost. An enforceable contract has been executed. Modification will require additional consideration. In the words of *The Business Roundtable*,

in its *Construction Industry Cost Effectiveness Project*, "... the most successful contracts have one fundamental characteristic in common, thoughtful and meticulous preparation by the Owner *before* the contract is let."[2]

Parenthetically, the "boiler plate" contract is typically not reviewed by legal counsel until the contract has been awarded. The Owner may fail to realize a binding contract exists. Frequently, customized alteration of the "boiler plate" language does not occur, leaving all the parties to the contract vulnerable because the contract documents do not address the specific problems peculiar to the particular project. More importantly, in an era when the architect's and contractor's duties are measured by the specific terms of the contract, the commercial expectations must be clearly defined.[3]

For example, where an architect was contractually bound to supply all necessary plans and specifications for *only* the architectural and structural portion of the interior remodeling of a building, it was held to be a triable question of fact whether the absence of a sprinkler system required by the building code should have been specified in the mechanical portion of the contract or the architectural or structural portion of the work.[4] If the role of the architect was initially clearly defined in the contract, this dispute could have been avoided.

The Architect's Consultants

The architect, after conceptualizing the Owner's goals, must prepare detailed plans and specifications. In preparing the plans and specifications, the architect must deal with mechanical, structural, electrical, and other consultants calling for the expertise of engineers and an array of other design professionals.[5] The contract document should require that the other professionals who will be engaged by the architect at his direction and expense shall possess the experience and knowledge to qualify them for the tasks assigned and shall maintain minimally acceptable amounts of professional liability insurance. Similarly, all design professionals should be contractually required to comply with applicable laws. The architect cannot avoid liability by delegating to other design professionals the responsibility for design.[6]

The Owner's Duties

The Owner must articulate to the architect the Owner's objective in building or remodeling a structure.[7] The Owner's budgetary limitations, as well as, the financial arrangement for undertaking the project, must be discussed and understood. The scope of the project must be defined with specificity and updated as the project progresses.

The Owner must designate a representative with authority to act and make decisions.[10] The Owner, at this stage of design, must also authorize work to be performed by other professionals. It is most embarrassing to build a multi-million dollar structure on property owned by an unrelated third party. Thus, title must be confirmed, as well as, recorded rights of way, easements, encroachments, and deed restrictions.

Soil engineers or other consultants should perform test borings, test pits, soil bearing values, percolation tests, etc., to adequately advise the architect of the peculiarities of the site for design consideration and ultimate cost impact to the Owner.[11] This work should be recommended by the architect and performed at the Owner's expense.

A certified survey must be performed to confirm grades, street lines, alleys, rights of way, easements, restrictions, and encroachments.[12] The importance of an accurate survey cannot be over-emphasized. It is the Owner's contractual duty to provide a survey to the architect. The standard form agreement has shifted the responsibility to the Owner to insulate the architect from liability arising out of an inadequate survey. The Owner must supply a detailed survey which complies with the state land survey standards, which may include, *inter alia*, a legally certified staked land survey with all corners monumented which reflects topographical grades, streets, alleys and pavement lines, adjoining property, rights of way, and use restrictions by deed or otherwise, easements and zoning restrictions, encroachments, boundaries of the site, locations and dimensions of existing buildings, location of other improvements and landscaping, and location of service and public and private utility lines above and below grade, including inverts and depths.

In addition, information regarding potential flood plain and natural wet land areas should be provided. Under the National Flood Insurance Program, the Federal Emergency Management Agency (F.E.M.A.) will not provide flood insurance to property owners whose property is in violation of state or local laws, regulations or ordinances intended to discourage development or occupancy of flood-prone areas.

Further, natural wetland areas should be designated on surveys. Wetlands have been provided much greater protection in recent years. The United States Fish and Wildlife Service is required to develop a National Wetlands Inventory.[13] Inventories in many states have been completed. In addition, the United States Army Corps of Engineers is authorized to issue permits for dredging and filling of wetland areas.[14] If a person dredges or fills a wetland without such a permit he may be liable for a fine of up to $25,000 per day.[15] Thus, wetlands information should also be disclosed. Toxic waste must also be considered as potentially on the site.

The Owner must furnish such other consultants' tests, inspections and reports as are required by the scope of the project and as requested by the architect or required by law.[16] The architect has a contractual right to rely on the accuracy of all reports supplied by the Owner.[17]

The Owner also has a duty to secure rights of way and make the site available to the contractor to perform its work.[18] The Owner has an affirmative duty not to prevent, impede, hinder or delay the orderly performance of the contractor's duties.[19]

The Owner has a duty to furnish legal, accounting, and insurance counseling services as necessary.[20] The Owner is well advised to have qualified legal counsel *before* engaging the architect.[21]

The Owner has a duty to promptly notify the architect of any fault or defects in the project or non-conformance with the contract documents.[22] The Owner further has a duty to expeditiously furnish approvals, information, and decisions for the orderly progress of the architect's services and the work.[23]

The Architect as an Independent Contractor

The architect is an "independent contractor." The acts, errors omissions, and negligence of the design professional do not create vicarious liability on the Owner.[24] Similarly, the consultants engaged by the architect create no additional liability on the Owner. However, if the Owner retains control over the manner in which the architect supervises the project, the Owner becomes vicariously liable for the architect's acts.[25]

The Nature of the Specifications

The plans and specifications must be definite. Specifications dictate the quality and installation of the materials and the integrity of the entire project. Competitive bidding requires specifications that permit bidders to bid on the same project. Without detailed plans and specifications, bids cannot be competitive in that they are not subject to comparison.[26]

There are four basic approaches to the preparation of specifications: descriptive specifications, reference standard specifications, performance specifications, and proprietary specifications. Descriptive specifications, or the methods system, designate with a great degree of specificity the quantity and quality of materials and the manner of implementation of the project. The contractor assumes the responsibility of constructing the work in strict accordance with the specifications. The architect or engineer assumes total responsibility for the propriety of the material and design of the work. Descriptive specifications are not as widely used as in the past. With today's complex designs, this process of defining specifications is very lengthy and tedious.

Reference standard specifications incorporate set standards established by trade associations, governmental, or institutional entities and private industries as the criteria for the project. Examples include the American National Standards Institute (ANSI), American Concrete Institute (ACI), and the American Society for Testing and Materials (ASTM). The use of these reference standards can save time in the preparation of the specifications.

Performance specifications allow the architect to establish a design concept by designating minimally acceptable criteria for the implementation of the concept or result. It is the contractor's obligation to build a structure that comports with the design concept. This approach is

more appropriate where integrated assemblies and composites are utilized to create systems or standardized buildings.

Proprietary specifications involve designating a particular manufacturer's name or model or specifying a product that is available from only one source. The advantage of this method is control over the quality of the products enabling a more detailed design based on the manufacturer's data. However, proprietary specifications eliminate competition and also may specify products with which the contractor has never worked.

A great wealth of information and experience has been recorded on known materials and methods. An experienced architect's detailed specification of the materials to be used and the workmanship necessary to produce the design concept is preferable to the average contractor's determination of what materials and methods of workmanship are necessary to fulfill the architect's design concept. Where appropriate, however, descriptive, performance, reference standard, and proprietary specifications can be contemporaneously utilized by the architect.[27] The contract document should indicate the type of plans and specifications to be prepared.[28] The architect's fee should be directly related to this quantum of skill and time required as well as the amount and kinds of work to be performed.

Preparation of Construction Documents

The architect is responsible for preparing contract documents, reviewing bid proposals from contractors, and recommending to the Owner the lowest responsible bidder to be awarded the contract.[29]

Prior to the bidding or the negotiation of proposed contracts, the architect should submit to the Owner's attorney bid documents, particularly the general conditions and supplementary conditions, for review and approval. Coordination of provisions in the various contracts with the various parties involved in the project is an absolute must. The legal responsibilities of each of the parties should be clearly identified. This will be invaluable later if difficulties arise, and it becomes essential to sort out the liabilities of the various parties.

On-Site Observation v. Supervision

As construction commences, the architect approves samples, schedules, and shop drawings for conformance with the contract documents. The architect provides periodic visitations to the site.

The parameters of periodic "on-site observation" during construction must be clearly defined and understood. This is an area most frequently misunderstood by the Owner. The language in the standard contract of the American Institute of Architects clearly distinguishes "periodic observations" from "supervision."[30]

Under these terms, a basic service of the architect is to periodically *visit* the site, but *not* to *supervise* construction "means, methods, and techniques." The architect expressly disclaims liability for means, methods, and techniques. The architect, nevertheless, has authority to reject work that does not conform to the contract documents.[31] The architect does *not* have authority to stop construction, unless written authority is received from the Owner. There is no duty to provide full-time attendance on the site. The architect is under no obligation to make extensive or exhaustive inspections or tests; there is no duty to attend all progress and coordination meetings conducted by the general contractor. If the Owner expects the architect to provide intensive inspection and assume a broader role in protecting the Owner's interest, he must contract for it and pay for it, commensurate with the additional service provided.[32]

A "project representative" may be added to the job site by the Owner for more extensive representation of the Owner.[33] Engaging a skilled full-time representative to provide continuous control of performance has been recognized as a necessary factor in the avoidance of failure.[34] It should be recognized that construction cycles result in a dramatic increase in work without the availability of the required number of skilled and trained tradesmen to complete the work. Thus, the risk of failures can be reduced with the proper continuous inspection and full-time observation of the contractor's performance. The quality of the inspection is, of course, dependent on the skill and experience of the project representative undertaking inspections, and admin-

istrative responsibilities must be well-defined in a separate contract document.

If the Owner does *not* want to pay for more extensive inspection, the contract should at least specify what constitutes "periodic observations" by the architect. For example, how long shall he/she spend on each observation? How often will observations occur? Who will perform the observation? The objectives of "on-site" observations should also be enumerated, *e.g.*, to monitor the work and acknowledge conformance of the work to the specifications with respect to the quality, acceptability, and fitness of the work and materials.

An architect is not relieved of his duty to superintend construction merely because the Owner was on-site during the course of construction and may have observed deficiencies.[35] For knowledge of defects to be imputed to the Owner it must be demonstrated that the Owner was aware of the deficiencies and comprehended the significance of the deficiency.[36]

A qualified full-time observer fully versed in the construction plans and specifications with well-defined responsibilities will save the Owner a great deal of money in the long run.[37] Improper construction can be more readily observed, stopped, and repaired at the time of construction. When a failure is discovered years later, costs are far higher because of the time and expertise required to unravel the cause of the failure. Many times discovery of the problem comes after the statute of limitations has run; therefore, legal remedies are not available.[38]

Construction Management

The Owner should seriously consider engaging a qualified and *independent* construction management firm. A construction management firm (CM), in conjunction with the architect, will treat planning, design, and construction as an integrated task. If a CM is involved in the construction project from the beginning, the Owner may be able to save thousands of dollars in construction costs by value engineering. The CM and the architect can jointly develop the best and most economical construction program. The Owner can assume that supervision will be strict since clear responsibility for the management and supervision of the project rests with the CM. Many archiectural firms market themselves as CM's. How independent can their judgment be if failure arises?

In any instance in which a professional is engaged to "supervise" construction, a separate agreement should define with specificity the duties of the construction manager.

Resolution of Ambiguities and Inconsistencies and Approval of Shop Drawings

The architect, in his role as interpreter of the contract documents, must resolve any ambiguities and inconsistencies in the contract documents that emerge during construction.[39] For example, the specification may be in conflict with the manufacturer's recommendations; or one division of the specifications may create an ambiguity as to which of several specialty contractors are responsible for the performance of work. Discretion with respect to ambiguities and inconsistencies should *not* be granted to the contractors. The architect must resolve inconsistencies and clarify ambiguities in the documents in writing.

The contractor prepares shop drawings to illustrate work to be performed by the contractor. The shop drawings are then submitted to the architect for review and approval.[40] The architect's approval of shop drawings should require more than mere conformance with the design concept. Approval should be granted by the architect only if the shop drawings are wholly in conformance with or exceed the requirements of the contract documents.[41]

The Architect's Standard of Care

- **Malpractice**

Breach of the minimum common-law standard of care by the architect in providing professional services may result in property damage and economic loss to the Owner that may *not* be recoverable under a malpractice theory.[42]

The courts distinguish between contract actions, which safeguard commercial expectations and tort actions, which safeguard persons and property against injury. A plaintiff[43] will recover under a tort theory for purely economic losses, absent dangerous or threatening conditions.

The economic loss rule does not, however, affect "malpractice" claims based on a breach of an implied term of a professional services contract. The Owner would be well-advised to expressly compel the architect or engineer to per-

form within the standard of care of the profession and to maintain professional malpractice insurance. If a design error or omission occurs because of the architect's breach of contract to exercise ordinary and reasonable care, adequate insurance will exist to cover the property and economic loss under the professional liability insurance policy. The unsuspecting Owner who has little experience in the consequences of engaging an architect will be economically devastated if the traditional remedies prove inadequate. An express contractual obligation to perform within the competence and ability ordinarily prescribed by members of the profession without insurance coverage may result in a Pyrrhic victory. The Owner must set forth the architect's professional standard of care in the contract and insist that the architect carry adequate professional liability coverage for property damage and economic loss that may be incurred due to the architect's failure to exercise ordinary care and diligence.

When recovery is sought under the contract, the contract defines the duty owed, and also limits the choice of defendants to those in privity to the contract.[44]

- **Wilful and Wanton Conduct: Punitive Damages**

To assert a claim for punitive damages against the design professional, a clear claim of health, safety or life threatening conditions must be pled.[45]

The Architect's Insurance Coverage

An architect, engineer, or other professional should maintain insurance coverage up to reasonable limits, including professional liability insurance, with a reputable insurance company. The architect, under the A.I.A. contract, is *not* required to maintain minimal insurance coverage. The Owner is required to pay for

> ... expenses of any additional insurance coverage or limits, including professional liability insurance, requested by the Owner in excess of that normally carried by the architect and the architect's consultants.[46]

Insurance coverage should be one of the elements considered by the Owner in employing the design professional. A schedule of insurance should establish *minimal* coverage for workers' compensation, comprehensive automobile liability, comprehensive general liability, umbrella coverage, professional liability, Structural Work Act, and valuable papers insurance. Insurance is one of the costs of doing business. Realistic insurance coverage should be the exclusive responsibility of the architect.

Any alteration of the scope of the architect's responsibility must be contemplated in light of the impact on professional liability coverage. The Owner must ascertain (1) whether insurance coverage exists and (2) whether the limits are reasonable in light of the nature of the project and the architect's exposure to liability. The limits and coverage must be set forth in a separate schedule and appended to the contract.

THE OWNER AND THE GENERAL CONTRACTOR

Contracting Procedures

Public projects must be publicly bid. The terms of the contract documents, however, bind the parties. It is very common for standard general conditions to be incorporated by reference into the contract documents. Neither the Owner nor the contractor can avoid the terms of the general conditions by testifying that they neglected to read the terms of the general conditions.[47] For convenience, the American Institute of Architects General Conditions A.I.A. A201 ©1976 and ©1987 editions are referenced herein. Reference is made to both editions where applicable for the reader's convenience. The A.I.A. Documents are but only one example of standardized contracts.[48]

Coordination and Supervision of Construction

In the absence of contractual language to the contrary, the Owner has an obligation to coordinate construction amongst the various contractors.[49] The General Conditions provide that:

> The contractor shall supervise and direct the work using his best skill and attention. He shall be solely respon-

> sible for and have control over all construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the Work under the Contract.[50]

The general contractor's responsibility for coordination is dependent upon a contractual relationship with the sub-contractors.

The traditional approach to awarding a contract is premised on a single contract system. The general contractor submits a combined bid in which specialty contractors subcontract the work to the general contractor, and for an additional fee, the general contractor assumes responsibility for coordinating, scheduling, and paying all the subcontractors. A hybrid of this approach is the specialty contractor's submission of bids to the Owner, execution of a contract with the Owner, and assignment of the contracts to the general contractor for coordination and supervision.[51]

Awarding of multiple prime contracts results in the Owner entering into direct contracts with the general and specialty contractors. In the absence of the delegation of coordination and scheduling, each prime contractor has no obligation to assume such responsibilities.[52] The General Conditions provide that:

> The Owner will provide for the coordination of the work of his own forces and of each separate contractor with the Work of the contractor ...[53]

The Owner is well-advised to spell out who will assume the responsibility of coordination and supervision, be it the general contractor, the architect, or a construction manager. Failure to do so courts disaster.

The Contractor's Obligation To Insure

The contractor's insurance obligations are typically scheduled. Comprehensive general liability (CGL) insurance provides the broadest coverage. The principal hazards covered by a CGL policy include (1) Premises-Operations - protection from liability arising due to property damage and personal injury arising out of a condition of the insured's premises or due to the insured's ongoing operations; (2) Independent Contractors Protective Liability - protection from liability arising out of operations performed for the insured by an independent Contractor or sublet operations; (3) Completed Operations - protection from liability for injury or damage caused by the completed work (not to the work itself); (4) Products-protection from liability arising out of the named insured's product or reliance upon a representation or warranty. The Owner, architect, construction manager, and their respective employees and agents should be named as "additional insureds" under a "protective liability endorsement."

Under the standard A.I.A. A201 (©1976) contract, the Owner is obligated to "maintain property insurance upon the entire Work at the site to the full insurable value thereof...." ¶11.3.1. "The Owner and contractor waive all rights against (1) each other ... for damages caused by fire or other perils to the extent covered by insurance obtained pursuant to this paragraph ¶11.3, or any other insurance applicable to the Work." ¶11.3.6. Similar contractual restrictions apply to damage arising due to loss of use of the property due to fire or other hazards. ¶11.4.1. These provisions have been interpreted that insurance alone will provide the source of recovery for any property loss or damage to the Work.[54] Thus, to the extent the Owner's insurer pays for the claim, the Owner will be made whole. The Owner has no remedy against the participants to the construction process if the insurance is insufficient to cover total damages incurred.

The contractor's insurance does not protect the Owner's project from error, omissions, or deficiencies in design, specifications, workmanship, or materials.[55] The insurer is not a guarantor of the contractor's performance bond or the full faith and credit of the contractor. The CGL policy provides protection against liability to the persons injured or other property damaged.[56] If the surety bond has expired, the solvency of the contractor is the best insurance to provide protection for the cost of repair and replacement of defective construction. Hence, the solvency, size, history, and liquidity of the contractor should be a significant factor in awarding a construction contract. Under the CGL policy, the insurer has a duty to defend the contractor from claims against it *even* if the insurer has no obligation to indemnify the insured.

Contractual liability coverage provides protection from liability expressly assumed under

the construction contract. The typical construction contract has a hold harmless, defense, and indemnification agreement. Many jurisdictions expressly prohibit indemnification for one's own negligence on construction projects.[57] However, there may be no prohibition against the contractor purchasing insurance coverage to protect the Owner from liability arising out of the Owner's negligence.[58] Thus, the contract requiring the contractor to procure Public Liability Insurance to protect the Owner against loss or liability because of personal injury is enforceable, notwithstanding the Owner's negligence.

Umbrella excess coverage literally is coverage in excess and in the aggregate of underlying primary policies. Use of umbrella coverage and coordination of underlying policies requires an expert. The Owner is well-advised to consult his insurance broker to assure maximum protection.

Explosion, collapse, and underground hazards (XCU), are typically excluded from the CGL policy. The nature and scope of the job dictate whether XCU should be added by endorsement. Coverage for Worker's Compensation and Scaffolding Act liabilities, and business automobile liability coverage should be thoroughly investigated by the Owner's broker to provide maximum comprehensive insurance coverage and protection to all parties on and off the project work site.

Caution! The contractor has a contractual duty to submit evidence of insurance by tendering certificates of insurance to the Owner. A201 ©1987 ¶11.1.4. The Owner's failure to insist on proof of insurance has been held in at least one jurisdiction to constitute a waiver of the insurance requirements.[59]

The Owner's Obligation To Insure

The contract documents must establish responsibility for risk of loss. Under the A.I.A. document, the Owner is obligated to purchase liability insurance and "all risks" property insurance, which include physical loss or damage to the construction project arising from theft, vandalism, fire, lightening, windstorm, explosion, and malicious mischief. Additional coverage for flood damage and equipment in transit is recommended. Failure to provide such insurance exposes the Owner to liability for the loss.[60] The Owner commonly names the contractor as an additional insured. Each is insured to the extent of his insurable interest at the time of the loss.[61]

The Owner is also obligated to purchase boiler and machinery insurance.[62] The Owner may, under the contract documents, insure for loss of use of the property due to fire and other hazards.[63] Failure to procure such insurance constitutes a waiver of action against the contractor for those insurable risks. Mutual waivers of subrogation are desirable.[64] Close coordination of insurance coverage by a knowledgeable broker is essential.[65] The Owner has a duty to file a copy of all insurance policies with the contractor before commencement of the project.[66]

The Owner's Obligation To Furnish Evidence of Financing

The General Conditions require the Owner to provide evidence of sufficient financing or availability of funds to pay for the contracted work.[67] If such language exists, submission of evidence of adequate funds of financing is a condition precedent for the contractor to commence construction.[68]

Changes, Extras, Credits, and Waiver

The Owner may unilaterally order changes in the work, provided a "change clause" exists in the contract documents,[69] and further provided the change does not constitute a "cardinal change," a change materially beyond the scope of the original contract documents.[70] The Owner is not obligated to pay the contractor additional compensation when the work is expressly or reasonably implied by the plans and specifications or incidental thereto.[71] The Owner is not obligated to compensate the contractor for the work which is more difficult than the bid price would reflect.[72]

The Owner is obligated to pay the contractor for "extras" or modifications to the work authorized by the Owner. The Owner is entitled to "credits" for modifications to the work that result in a savings to the Owner.[73]

A contractor, to recover additional compensation for "extras" from an Owner, must prove by clear and convincing evidence that (a) the work

was outside the scope of the contract; (b) the extra work was ordered by the Owner; (c) the Owner agreed to pay for the extra work, either by his words or conduct; (d) the extra work was not voluntarily furnished by the contractor; and (e) the extra work was not necessitated by the contractor's error or fault.[74]

Most contract documents call for changes to be approved by the Owner in writing.[75] Unfortunately, field conditions may necessitate that the architect direct extra work to be performed prior to written approval. The change order requesting an extra is often submitted after the project is complete. The Owner can, by his action or inaction, waive the contractor's obligations to submit written change orders for prior approval.[76] Similarly, a contractor who fails to protect, negotiate, comment, or otherwise call to the Owner's attention ambiguities in the contract resulting in additional cost may waive entitlement to an "extra."[77] The Owner must have the opportunity to consent to the additional expenses incurred by the "extra."[78]

Changed or Concealed Conditions

The A.I.A. A201 Owner-General Contractor, General Conditions, recognizes "Construction Change Directives" which is used in the absence of total agreement on the terms of the agreement.[79] Also, "minor changes" are recognized as minor changes in the work not involving adjustment in the contract sum or time.[80]

Frequently, the contractor encounters site conditions that were unanticipated, resulting in significant additional expenses, *e.g.*, sand, peat bogs, artesian wells, organic fill, sink holes, rocks, boulders, etc. The risk for the additional expense rests with the contractor. The common-law rule is that the contractor is not excused from the performance of his contract because of unforeseen difficulty or unusual and unexpected expense.[81] In the absence of fraud, negligent misrepresentation, and mutual mistake, the contractor is obligated to perform.

A "concealed conditions" or unforeseen conditions clause[82] attempts to ameliorate the harshness of the risk assumed by the contractor. To trigger the right to an equitable adjustment of the contract price, the contractor has the burden of proving an encounter with concealed conditions that (1) are at a variance with the conditions disclosed in the contract documents or (2) are of an unusual nature, differing materially from the conditions ordinarily encountered and generally recognized as inherent in the nature of the work. A claim for an equitable adjustment must be made upon discovery of the concealed condition.

It is in the Owner's interest to compensate fairly the contractor for work performed. If, indeed, site conditions differ significantly from anticipated conditions, the contractor's bona fide loss incurred due to the concealed conditions will be attempted to be made up in other areas of the project to the ultimate detriment of the Owner.

If reports and boring samples are provided or made available in the contract documents and provide sufficient information to infer that adverse conditions will be encountered, the contractor should *not* be entitled to an equitable adjustment. However, where the soil reports reflect a condition which proves contrary to the existing conditions, the contractor may be entitled to an equitable adjustment.[83]

Time for Completion

The importance of time under a construction contract can be understood in terms of interest rates, inflation, and the Owner's contractual commitments to prospective tenants or the Owner's need to put to productive use the premises under construction. The time requirement for completion for the construction of a project is dependent upon the terms of the contract.[84] Time may be made "of the essence" by express agreement of the parties.[85] Failure to make "time of the essence" imposes an obligation on the contractor to complete the project within a reasonable time.[86] The Owner and the contractor are both bound by the benefits and obligations of a "time of the essence" clause.[87]

Delays

The Owner has a duty to avoid imposing delays on the contractor and may be liable to the contractor for damages reasonably and proximately caused due to the delay.[88] The Owner has been held liable for damages where the Owner delayed the construction project due to the Owner's insolvency,[89] default,[90] failure to approve materials,[91] and failure to make the construction site available.[92] The Owner has also had to pay delay damages where the Owner's

representative failed to approve shop drawings, where the Owner failed to coordinate multiple prime contractors, where design deficiencies delayed construction, where the Owner suspended construction, where the Owner's representative failed to make timely inspections, and where excessive change orders caused delay.

If the contractor is responsible for delay, he is liable to the Owner for damages that reasonably and proximately arise therefrom.[93] The contractor has been subject to delay damages when the contractor has defaulted *(Board of Library Trustees, supra),* and for failure to man properly the job, failure to order material and equipment in a timely fashion, failure to coordinate construction, and delays caused by a failure to follow the plans and specifications or good workman like practices.

Causes for compensable delay are not usually uniquely attributable to one contractor. Some courts have apportioned delay damages amongst those responsible for delay.[94]

The parties may include a "no damage for delay" clause which has been found to be enforceable in most jurisdictions.[95] However, if a "no damage for delay" clause exists, and the Owner does not act in good faith, or the delay is unreasonable in duration, or arises due to inexcusable neglect or incompetence, the clause has not been held binding on the parties.[96] The "no damage for delay" clause is not only enforceable, but the architect as a third-party beneficiary of the Owner-Contractor agreement may invoke the benefits of it.[97]

Substantial Completion

The contract documents generally recognize a state of substantial completion of the project.[98] When the contractor considers the work or a portion of the work substantially complete, a list of items to be completed or corrected is prepared by the contractor. The architect upon receipt of the list inspects the work to determine whether the list is accurate. Before issuance of a certificate of substantial completion by the architect, such items identified by the architect shall be corrected. The Owner may include contract language to offset the cost of repeated inspections by the architect against the outstanding sums due the contractor.[99] When the outstanding punch list items are completed, a final certificate of payment is issued.[100] The architect certifies the date and time of substantial completion.

The date and time of substantial completion has significant impact on the parties. Risk of loss shifts to the Owner. The Owner becomes responsible for security, maintenance, heat, utilities, damage to the work, and insurance. Mere acceptance of the work by the owner constitutes neither acceptance of defective work[101] nor a waiver of a right of action against the contractor for defective work.[102]

The Owner cannot expect perfect performance.[103] The law imposes on the contractor a duty of substantial performance in a good workmanlike manner and in accordance with the plans and specifications. The contractor who substantially performs is entitled to the contract price less an offset for any deficiencies existing in what was received as compared to what strict performance would have required.[104]

When a contractor's performance is less than substantial, the contractor may recover reasonable compensation for the value received less the injury suffered due to the builder's breach of contract.[105]

Substantial performance means performance in all the essential elements necessary to accomplish the purposes of the contract. An Owner who receives substantial performance of a building contract must pay the price bargained for, less an offset for defects in what he received as compared to what strict performance would have given him.[106]

The Owner's Duty To Pay

The Owner's duty to pay is controlled by the contract documents.[107] In absence of a contract provision to the contrary, the general custom or usage in the building trades is that the contractor shall be paid as work progresses.[108]

Failure of the Owner to make progress payments without cause amounts to a material breach of the contract.[109] Under the contract documents, the contractor may stop all work because of payments unlawfully withheld.[110] [111]

In many jurisdictions, the Owner, however, has a statutory duty to demand, and the contractor has a statutory duty to supply, a verified statement of the names of all parties furnishing labor and materials and amounts due or to become due before each payment is made to the contractor.[112] The Owner's lender or construc-

tion escrow agent may demand such information and withhold payment until such is received.[113]

The Owner's Right To Withhold Payment

The Owner may withhold payments when the contractor's performance is unsatisfactory. The Owner need not pay the contractor if the architect declines to certify payment.[114] The architect can decline certification in whole or in part. ¶9.6.1. The architect, within seven days of receipt of the contractor's applications for payment, must notify the contractor in writing of the reasons for withholding a certificate of payment.[115] The architect, if unable to agree on a revised amount with the contractor, can issue a revised payout certificate. The revised certificate can unilaterally reflect the architect's assessment of work completed in accordance with the contract documents. The architect can reduce the payout request in an amount sufficient to (1) pay for defective work not remedied; (2) pay for anticipated third party claims; (3) pay for unpaid subcontractors and materialmen; (4) pay for work that cannot be completed from the unpaid balance; (5) pay for damages incurred by the Owner or other contractors; (6) pay for delay damages due to failure to complete; and (7) pay the expense of completing the work in accordance with the contract documents.[116] When the objections are removed by the contractor, the architect must certify the work for payment.[117]

The Owner is not in breach of the contract due to the Owner's failure to pay the contractor. The Owner may ultimately be compelled to pay something under a *quantum meruit* theory. The contractor can recover only reasonable compensation for value received by the Owner, less the damages incurred by the Owner to correct or complete the omission due to the contractor's breach of contract.[118] Whether the contractor is in breach of the contract (*i.e.*, the contractor has not performed) is a question of fact. The line of demarcation between breach of contract and substantial performance is at best gray.[119]The amount withheld from the contractor should approximate the amount necessary to correct deficiencies and complete performance, the incidental expenses incurred as a result thereof, and retainage in proportion to the percentage of completion.

The Owner's Obligation To Withhold Payment To Protect Lien Claimants

When the Owner has notice of a subcontractor's claim on the project funds due the contractor, the Owner must withhold sufficient funds to pay the claim. The Owner is not entitled to a credit for payments made to the contractor in derogation of the subcontractor's rights. This is true even if the Owner has paid the contractor in full. However, where the Owner relies on the contractor's affidavit that subcontractors have been paid, and the Owner in good faith makes payment to the contractor, the Owner is protected against subcontractors' claims.[120]

Rejection of Work

Typically, during the course of construction, the architect or Owner observes construction practices that fail to conform with either good workmanlike standards or the plans and specifications. The architect under such situation may reject the work.[121] The contractor, at his expense, has an obligation to make corrections to conform the work to the contract documents.[122] Generally, the contractor will make the correction of the defective performance and bear the expense of the correction. However, when the contractor *denies* improper work, the Owner can either stop the work and compel the contractor to cure the default, or the Owner can take over that portion of the work, correct it and charge back the expenses incurred for correction to the contractor.

Stoppage of Work

If the contractor fails to complete the work or correct the work declared deficient and rejected by the Owner or the Owner's authorized agent, the Owner may order the contractor to stop that portion of the work.[123] The contractor is obligated to correct promptly all work rejected. The Owner's decision to stop the work should be based on the architect's written recommendation that sets forth with particularity the rationale for the decision. The Owner's notice to the contractor to stop should reflect what the cause for the stoppage is and what must be accomplished by the contractor for the Owner to rescind the stop order.

It is important to note that the Owner need *not* reject *all* work nor order *all* work stopped. The Owner need only reject and stop that portion of the work that is unsatisfactory. Therefore, the remainder of the project can proceed as scheduled. The contractor has an obligation to diligently and promptly correct the cause of the stop order. If the contractor fails to commence correction of the defective work after notice of stoppage is provided, a second notice is given to the contractor, advising him that the Owner is taking over that portion of the work. The Owner can then engage an independent contractor to perform the work and charge back the work to the contractor at fault. The procedure to follow is set forth in the contract document.

The Procedure To Correct Rejected and Stopped Work

The Owner-Contractor Agreement sets forth the procedure for the Owner to take over and correct and/or complete work he rejects and stops.

The Owner must give the contractor written notice of the default or neglect and direct the contractor to commence promptly and diligently corrections of the deficiency. The Owner is well advised to bring in qualified independent consultants to confirm and memorialize the deficiencies. Daily field reports, if necessary, must reflect the contractor's failure to correct promptly and diligently the deficiencies. Copies of the field report should be submitted to the contractor or his representative on a *daily basis. If the contractor fails to take prompt and diligent corrective action, the Owner can immediately make the correction* provided the Owner serves *written notice* of the Owner's intent to take over that portion of the work and correct and/or complete the work. The second written notice must be served seven (7) days after the contractor has *received* notice to correct defective and rejected work. The notice should reflect the contractor's failure to correct promptly and diligently the deficiency. The notice should order the contractor to stop work on that portion of the work and express the Owner's intention to take over the portion of the work and to issue a change order to charge back the work to the contractor.[124] A copy of the notice should be sent to the surety.

Termination

If the contractor's financial status or performance constitutes a material breach of the contract, the contractor may be terminated. However, cause for termination usually does not always come in one neat package. Default and cause for termination may occur after a long series of disagreements. The aggravation of these small disputes coupled with the increasing frustration and antagonism on the job site escalates into a confrontation that may not be demonstrable in a forum of dispute resolution.

The numerous disputes require the memorialization of the essential facts of the dispute. Failure to do so will result in a subsequent inability to identify the dispute or its causes.[125] Termination of the contractor imposes upon the Owner the burden of proving the contractor's default and showing that the default is a material breach of the contract giving rise to the Owner's right to recover damages and assure recovery on the performance bond.[126]

The contract dictates the procedure for terminations.[127] Two steps are required to terminate the contract. First, the architect must certify to the Owner that sufficient cause exists to justify termination under the contract. Second, the Owner serves written notice on the contractor and the surety of termination.[128]

Notice should be served by certified or registered mail. The notice of termination should set forth with particularlity the cause(s) for termination.

The contractor must be given the opportunity to cure the defect within the seven-day time period. The Owner cannot obstruct, interfere, prevent, or impede the contractor from making corrections to the defect.[129]

The Owner, seven days after giving the contractor notice of termination, may terminate the contractor, take possession of all materials and equipment owned by the contractor that is on-site, and complete the construction. Typically, *during* the seven-day hiatus, the contractor can cure the default, the Owner can make arrangements for completion of the project, and the surety can investigate the problem and decide on a course of action.[130]

Under the typical contract, cause for termination arises under the following circumstances:

1. the contractor is bankrupt;[131]

2. the contractor has made a general assignment for the benefit of creditors;[132]

3. a receiver is appointed on account of insolvency;[133]

4. the contractor persistently and repeatedly fails to supply a sufficient number of skilled workmen or proper materials;[134]

5. the contractor fails to make prompt payments to subcontractors, laborers or materialmen;[135]

6. the contractor persistently fails to abide by laws, ordinances, rules, regulations, or orders of any public agency;

7. the contractor violates a substantial provision of the contract documents, *e.g.*, "time is of the essence."[136]

Terminations Must Be Based on a Material Breach of the Contract

Termination of a contractor from a construction contract must be based on a material breach of the contract. The materiality of a breach of contract is primarily a question of fact.[137] The decision to terminate without a material breach jeopardizes the performance and payment bond.

A breach prior to or at the outset of performance may justify termination, while the same breach late in the performance of the contract would not be a sufficient cause to terminate. Materiality and the degree of performance are interrelated. The factors considered in determining whether there is substantial performance of a building contract are the extent of the defect or nonperformance, the degree to which the purpose of the contract is defeated, ease of correction, and use or benefit to the Owner of the work performed.[138] For example, leaving more than ten percent of the work unfinished does not constitute substantial performance.[139] Similarly, a subcontractor who failed to provide timely information and perform work which was less than three percent of the general contract price was considered a material breach where time was "of the essence."[140] Cause for termination may also be premised on specific contractual language, *e.g.*, "time is of the essence."[141] If substantial performance is established by the contractor, the contractor may recover the contract price less the difference of what the Owner contracted for and in fact received.[142]

The Obligations of the Surety

The A.I.A. contract does not require a performance or payment bond. The A.I.A. General Conditions for public projects should be amended to require a performance and payment bond. At one time a bond constituted evidence of the contractor's fiscal status and track record. However, a bond does not guarantee the integrity, experience, and competence of the contractor and his personnel. A surety with an A+ rating and Class XV financial status in Best's Insurance guide, latest edition, provides security at least to the financial strength of the surety.

The surety can be contractually obligated, to the extent of the bond, to reimburse the Owner for all expenses incurred on the project because of the contractor's default. These expenses include attorneys', engineers', architects', and accountants' fees, as well as any and all other expenses incurred by the Owner as a result of the contractor's default.

Virtually every contract for public works of any kind requires a performance and payment bond. A successful bidder's failure to obtain a performance bond constitutes a material breach of contract and cause to terminate the contract.[143]

The purpose of the performance bond is to protect the Owner (obligee) from losses occasioned by the failure of the contractor (principal) to fully and completely perform the contract. The surety promises to perform the obligations of the contractor as required by the contract to the extent of the penal bond.[144] A performance bond and the contract it secures must be read as one instrument. When the bond incorporates the contract by reference, the provisions of the contract become the provisions of the bond.[145]

The typical surety bond does not authorize payment of attorneys' fees, architectural fees, accounting fees, testing, and additional expenses

incurred due to default or termination unless there is an express provision in the bond or contract.[146] Similarly, interest expense accrued in excess of the contract term is not recoverable.[147] Rental of heavy construction equipment is not recoverable.[148] If the surety's action is unreasonable or vexatious and it denies honoring the claim, the surety may become liable in excess of its penal bond.[149]

The typical performance bond (A.I.A. A311 ©1970) provides that when the contractor is declared by the Owner to be in default under the contract, the surety *may* promptly remedy the default, or shall promptly complete the contract or obtain bids to complete the work by the lowest responsible bidder.

Upon receipt of notice of default the surety has an obligation to investigate promptly the claim. The surety's representatives (usually his attorneys and consulting engineers) will investigate the "default" and ascertain if a material breach of contract exists triggering the contractual obligations of the surety.

The surety stands in the shoes of the general contractor (principal). The surety's obligations are the general contractor's obligations under the Owner's contract.[150] The surety may raise the defenses of the general contractor against the Owner's claim.[151]

The surety may not act in derogation of the interests of the contractor. Thus, the surety must inquire of the contractor as to whether the contractor is in default and honor the contractor's good faith assertion that it is not in material breach of the contract or that it has defenses that will defeat the Owner's claim. Notwithstanding a contractor's protestation that it is not in default, the surety has a duty to acknowledge default where, upon its independent investigation, it is evident.

The surety has been criticized in that there is a tendency for the surety to sue the Qwner and/or the architect for faulty contract administration claiming the Owner and/or architect was the cause of the contractor's inability to complete the contract.[152] Hence, the Owner is well-advised to establish a method of memorializing the progress of the job and to document the contractor's default. The materials should be compiled and tendered to the surety upon declaration of default.

The record will assist the surety in its investigation and reduce the influence of the contractor when the contractor denies default. Making documentation available to the surety during the course of construction makes the Owner's job easier in demanding that the surety assume responsibility on the bond.

Once the surety ascertains that the contractor is in default and it agrees to undertake its contractual duties under the bond, it assesses the most economical means to complete the job. The alternatives are to:

1. utilize the contractor (principal) to complete the job;
2. engage a "completing" contractor;
3. tender the job to the Owner to complete.

If the surety decides to complete the job bid using either the contractor (principal) or a "completing" contractor, the surety obligates itself to complete the project subject to the extent of a "reservation of right." If the contract is tendered to the Owner, the Owner must complete the project and account to the surety for expenses incurred. The surety is obligated to the Owner to the extent of the penal bond.

If the surety declines to honor the bond, the Owner has two choices: either complete the work and initiate litigation or arbitration to recover, or reinstate the contractor to complete the project.

Memorialization of the Project

Despite all precautions taken — performance and payment bonds, investigation of past performance, a continuous on-site observer, repeated requests, demands, and threats — the Owner, through its representatives, sometimes cannot budge the contractor to perform in accordance with the contract documents. Minor irritations arising from the contractor's performance have, in the aggregate, created frustrations and animosities which are on the verge of escalating to a formal declaration of war. Before battle action is taken, the Owner should review the evidentiary and legal steps necessary to reject work or to terminate the contractor.

The construction project commences with paper and ends with paper. The project record creates the evidentiary basis upon which action can be taken. The accurate and timely memorialization of construction development and re-

view of events can be the basis to justify any action taken. Utilization of the paper process to record contemporaneously events with specificity is the basis of successful litigation. More importantly, successful construction demands that directives be reduced to writing so a record of the timely completion of important items are not lost during the day-to-day construction operations.

If delay occurs, or other events occur that suggest remedial action against the contractor, a written record identifies it and establishes responsibility for the occurrence. The weekly construction meeting reports and daily logs prepared in the ordinary course of business and circulated to the various parties to the construction project may create the *evidentiary* basis for the Owner to recover damages incurred due to a material breach of the contract by the contractor or deny a delayed damages claim asserted by a contractor.[153] To protect and preserve adequately its interest, the Owner's representative must be closely involved in each stage of construction to identify immediately problems that, if handled at the outset, could reduce significantly the cost at the end of the project.

The Owner may be contractually entitled to recover against the surety as a result of default or termination in an amount not in excess of the penal bond. The Owner has a contractual right to complete the project in accordance with the plans and specifications. Good business and good construction practices require accurate, written follow-up. The Owner should be on the receiving end of daily or weekly job reports. Under the best of circumstances, a project can go astray. Anticipation of trouble is one way to avoid it.

The Owner, through the architect, and preferably through an independent engineer qualified to assess the defective conditions, must memorialize the defective condition for design and/or ultimate evidentiary purposes. All too frequently, the failure arises as a result of a combination of design, fabrication and construction problems. A forensic engineer's immediate evaluation of the cause of a defect may contribute to the prompt resolution of any dispute. Photographs and/or videotapes must be taken. Detailed written reports must be prepared that elucidate the defective conditions. The report should detail *when* the observations were made, *who* was present, *what* conditions existed, and *where* the conditions existed. The report should set forth with specificity *how* the conditions deviated from the plans and specifications or good workmanlike practices. The report should also suggest *what* the correct conditions should be without necessarily describing the means, methods, and techniques to make the correction. It is recommended that the report be circulated to all interested parties so that the memorandum can be corrected or any portion of the memo challenged at an early stage of the investigation in order that measures can be taken to report accurately the site conditions. Dissemination of field reports to all parties contemporaneous with the event affords them an opportunity to correct or challenge statements in the report. Failure to correct promptly or challenge the filed report may create a presumption that the report is accurate. Note also that the surety on the performance bond should be receiving copies of any documentation that reflect improper conduct on behalf of the contractor. One reason construction litigation is so expensive is the cost to *reconstruct* the cause of the failure. On-site observation that immediately identifies it and has it inspected by experts goes a long way to avoiding construction failures and construction litigation.

Conclusion

Construction litigation can be characterized as of the same magnitude as antitrust litigation. This article has addressed many of the duties and rights of the Owner. When those duties and rights are unfulfilled, disputes arise. An accurate analysis of the construction and/or design deficiency must be accomplished before significant action can be initiated. Precipitous action without a complete analysis may result in a time consuming, and economically unproductive endeavor. Anticipation of the problems frequently encountered during a construction project may avoid or mitigate the consequences of them.

END NOTES

1. *See also Engineers' Joint Contract Documents Committee Standard Form of Agreement between Owner and Engineer for Professional Services* (EJCDC No. 1910-1 (1984 Edition).

2. *Contractual Arrangements* at 2, Report A-F (October, 1982).

3. *See Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill. Dec. 746 (1982) and its progeny.

4. *Rest v. New Delman*, 59 Ill.App.3d 366, 375 N.E.2d 525, 16 Ill.Dec. 652 (1st Dist. 1978).

5. B141 ©1987, ¶1.1.1, 3.4.19; ©1977 ¶1, 1.7.21.

6. *Northern Petro Chemical Co. v. Thorsen & Thorsen, Inc.*, 297 Minn. 118, 211 N.W.2d (1973).

7. B141 ©1987, ¶ 4.1; ©1977 ¶2.1.

8. B141 ©1987, ¶4.2.

9. B141 ©1987, ¶4.3; ©1977 ¶2.2.

10. B141 ©1987, ¶4.4; ©1977 ¶2.3.

11. B141 ©1987, ¶4.6; ©1977, ¶2.4, 2.5, and 2.6.

12. B141 ©1987, ¶4.5, ¶4.9; ©1977 ¶2.4, 2.8.

13. *See*, 16 U.S.C.A. §3931.

14. 33 U.S.C.A. §1344 (§404 of the Federal Water Pollution Control Act).

15. 33 U.S.C.A. §1319 §309 of the Federal Water Pollution Control Act). *Also see, U.S. Cumberland Farms, Inc.*, 644 F.Supp. 319 (D.Mass 1986).

16. B141 ©1987, ¶4.61, ¶4.7; ©1977, ¶2.6.

17. B141 ©1987 ¶4.9; ©1977 ¶2.8.

18. *Gust K. Newberg, Inc. v. Ill. State Toll Highway Authority*, 153 Ill.App.3d 918, 506 N.E.2d 658, 106 Ill.Dec. 858 (2nd Dist. 1987); *cert. denied*, 116 Ill.2d 554; *J.F. Inc. v. S.M. Wilson Co.*, 152 Ill.App.3d 863, 504 N.E.2d 1266, 1269, 105 Ill.Dec 748 (5th Dist. 1987), *cert. denied* 115 Ill.2d 539, 411 N.E.2d 429, 110 Ill.Dec. 457 (1987).

19. *North Shore Sewer and Water, Inc., v. Corbetta Construction*, 395 F.2d 145, 150 (7th Cir. 1968).

20. B141 ©1987, ¶4.8; ©1971, ¶2.7.

21. *See* ¶1.2 *supra*.

22. B141 ©1987, ¶4.10; ©1977, ¶2.9.

23. B141 ©1987, ¶4.4; ©1977, ¶2.10.

24. *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 719 F.2d 1335 (7th Cir. 1983).

25. *Bernard Johnson, Inc. v. Continental Constructors, Inc.*, 630 S.W. 2d 365 (Tex.App. 1982); *Cutlip v. Lucky Stores, Inc.*, 325 A.2d 432 (Md. App. 1974); *Van Ness v. Independent Construction Co.*, 392 So.2d 1017 (Fla. App. 1981).

26. *Mohr v. City of Chicago*, 114 Ill.App. 283, 189, *aff'd*, 216 Ill. 320, 74 N.E. 1056 (1905); *Robinson's Inc. v. Short*, 146 So.2d 108 (Fla.App. 1962).

27. *See* Rosen, Construction Specifications Writing, pp. 39-48 (John Wiley and Sons, Inc. 1974).

28. B141 ©1987, ¶2.4.1; ©1977, ¶1.3.1.

29. B141 ©1987, ¶5, ¶2.4.1, and 2.4.2; ©1977, ¶1.3.1, 1.3.2.

30. ¶2.6.5; 2.6.6 (1987); 1.5.4, 1.5.5 (19-97). *See* B141 ©1987, ¶2.6.6.

31. B141 ©1987, ¶2.6.11; ©1977, ¶1.5.12.

32. *Moundsview Independent School District No. 621 v. Beutow and Associates, Inc.* et. al. 253 N.W.2d 836 (Minn. 1977).

33. B141 ©1987, ¶3.2.1, ¶3.2.2.; *See* AIA B352, ©1977, ¶1.6.1, 1.6.2, 1.6.3.

34. *See* Feld, *Construction Failure*, p. 12 (John Wiley & Sons, Inc. 1968).

35. *Lotholz v. Fiedler*, 59 Ill.App.379, 381 (1985).

36. *South Union v. George Parker & Associates*, 29 Ohio App.197, 504 N.E.2d 1131, 1136 (1985).

37. *Board of Education of Hudson City Schools v. Sargent Webster, Crenshaw & Folley,* 539 N.Y.S. 2d 814 (A.D.3 Dept. 1989).

38. *Ill.Rev.Stat.*, ch. 110, P13-214. *See Champaign County Nursing Home v. Petry Roofing, Inc.*, 117 Ill.App.3d 76, 452 N.E.2d 847, 72 Ill.Dec. 594 (4th Dist. 1983). *But See Chicago Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428 346 N.E.2d 480, 600 (1989) (governmental limitations immunity).

39. B141 ©1987, ¶2.6.12; ©1977, ¶1.5.13.

40. B141 ©1987, ¶2.6.12; ©1977, ¶1.5.13.

41. *See Hart, Representing the Architect in Dealing with the Owner and Contractor,* 7 Forum 197, 204, 213 (1972).

42. *See Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982); *Palatine National Bank v. Charles W. Greengard Associates, Inc.*, 119 Ill.App.3d 376, N.E.2d 635, 74 Ill.Dec. 914 (2d Dist. 1983); but see *Ferentchak v. Village of Frankfort,* 121 Ill.App.3d 599, 459 N.E.2d 1085, 76 Ill.Dec. 950 (3d Dist. 1984); *Illinois Housing Development Authority v. M-Z Construction Corp.*, 110 Ill.App.3d 129, 441 N.E.2d 1179, 65 Ill.Dec. 665 (1st Dist. 1982); *Bates & Rogers Construction Corp. v. North Shore Sanitary District,* 92 Ill.App.3d 90, 414 N.E.2d 1274, 47 Ill.Dec. 158 (2d Dist. 1981); *Normoyle-Berg & Associates, Inc. v. Village of Deer Creek,* 39 Ill.App.3d 744, 350 N.E. 2d 559 (3d Dist. 1976).

43. *Rosos Litho Supply Corp. v. Hansen,* (1st Dist. 1984); *Case Prestressing Corp. v. Chicago College of Osteopathic Medicine,* 118 Ill.App.3d 782, 455 N.E.2d 811, 74 Ill.Dec. 382 (1st Dist. 1983). *Santucci Construction Co. v. Baxter & Woodman, Inc.*, 151 Ill.App.3d 547, 402 N.E.2d 1134, 104 Ill.Dec. 474 (2nd Dist. 1986), relying on *Anderson Electric, Inc. v. Ledbetter Construction Corp.*, 115 Ill.2d 146, 503 N.E.2d 246, 104 Ill.Dec 689 (1986), which barred a contractor and subcontractor's malpractice claim against an architect/engineer for economic loss. *See also Kishwaukee Community Health Service Center v. Hospital Building and Equipment,* 638 F.Supp. 1492 (N.D.Ill. 1986).

44. In *Ferentchak v. Village of Frankfort,* 105 Ill.2d 474, 475 N.E.2d 822, 826, 86 Ill.Dec.443 (1985), the standard of Care *imposed* against an engineer for negligence was measured by the degree of care and skill ordinarily and reasonably exercised by the design professional. Although based upon tort rather than contract, the duty is nevertheless defined by the contract between the engineer and developer. The engineer's duty did not extend to homeowners of a development because his contractual duty was to the land developer. The engineer was engaged to design a water drainage system for a subdivision, not to establish individual home foundation grade elevations. *Bates & Rogers Construction Corp. v. Greeley & Hansen,* 109 Ill.2d 225, 486 N.E.2d 902, 93 Ill.Dec. 369 (1985), the general contractor's malpractice claim against the architect for delay damages was barred. The architect as a third-party beneficiary of the Owner-General Contractor Agreement invoked the "no-damages-for-delay" clause to preclude a claim against it as the Owner's representative. 496 N.E.2d at 906.

45. *Morrow v. L.A. Goldschmidt Associates, Inc.*, 112 Ill.2d 87, 492 N.E.2d 181, 96 Ill.Dec. 939 (1986).

46. B141 ©1977 ¶5.1.6; *See* ©1987, ¶10.2.1.5.

47. *Luczak Brothers Inc. v. Generes,* 116 Ill.App.3d 286, 451 N.E.2d 1267, 1276, 71 Ill.Dec. 900 (1st Dist. 1983).

48. *See also Engineers' Joint Contract Documents Committee Standard General Conditions of the Construction Contract* (No. 1910-8, 1983 Editions and revisions thereafter).

49. See *Stehlin-Miller-Henes Co. v. City of Bridgeport,* 97 Ct. 657, 117 A. 811 (1922); *Northeast Clackamas County Electric Co-operative v. Continental Casualty Co.*, 221 F.2d 329 (9th Cir. 1955).

50. A201 ©1976, ¶4.3.1.; *See also* ©1987, ¶3.3.1.

51. See *Ill.Rev.Stat.*, ch. 127, ¶132.6a-1.

52. A201 ©1987, ¶2.2.6; ©1976, ¶¶3.2.7 and 6.1.2.

53. A201 ©1976, ¶6.1.3.

54. *Village of Rosemont v. Lentin Lumber Co.*, 144 Ill.App.3d 651, 494 N.E.2d 592, 597, 98 Ill.Dec. 470 (1st Dist. 1986).

55. *U.S. Industries, Inc. v. Aetna Casualty & Surety Co.*, 690 F.2d 459, 460 (5th Cir. 1982) (all risk policy).

56. *Weedo v. Stone -E- Brick, Inc.*, 81 N.J. 233, 405 A.2d 788, 791 - 792 (1979); *LaMarche v. Shelby Mutual Insurance Co.*, 390 So.2d 325 (Fla. 1980).

57. *Ill.Rev.Stat.*, c. 29, ¶61, *et seq.*

58. *Zettel v. Paschen Contractors, Inc.*, 100 Ill.App.3d 614, 427 N.E.2d 189, 56 Ill.Dec. 109 (1st Dist. 1981). *Bosio v. Branigan Organization*, 115 Ill.App.3d 611, 506 N.E.2d 996, 998, 107 Ill.Dec.105 (2nd Dist. 1987).

59. *Whalen v. K-Mart Corp.*, 166 Ill.App.3d 339, 519 N.E.2d 991, 116 Ill.Dec.776 (1st Dist. 1988) *cert. denied.*

60. A201 ©1987, ©1976 ¶¶11.2.1 and 11.3.1. *See Premier Electrical Construction Co. v. Ragnar Benson, Inc.*, 111 Ill.App.3d 855, 444 N.E.2d 726, 728, 67 Ill.Dec. 490, 494-495 (1st Dist. 1982).

61. *Baker v. Aetna Insurance Co.*, 274 So.C. 231, 262 S.E.2d 417 (1980).

62. A201 ©1987, ©1976, ¶11.3.2.

63. A201 ©1987, ¶11.3.3; ©1976, ¶11.4.1.

64. A201 ©1987, ¶11.3.7; ©1976, ¶11.3.6.

65. *See Annot.*, 97 A.L.R.3d 1270 (1980).

66. A201 ©1976, ¶11.3.4.

67. A201 ©1987, ¶2.2.1; ©1976, ¶3.2.1.

68. See *Althoff Industries, Inc. v. Elgin Medical Center, Inc.*, 95 Ill.App.3d 517, 420 N.E.2d 800, 51 Ill.Dec. 386 (2d Dist. 1981).

69. A201 ©1976, ¶12.1.2.

70. *The Chicago and Great Eastern Railway Co. v. Vosburgh*, 45 Ill. 311 (1867); *County of Cook v. Harms*, 108 Ill. 151 (1883); *Smith v. Sanitary District of Chicago*, 108 Ill.App. 69 (1903).

71. *R & R Construction Co. v. Junior College District No. 529, Olney*, 55 Ill.App.3d 115, 370 N.E.2d 599, 12 Ill.Dec 795 (5th Dist. 1967).

72. *W.H. Lyman Construction Co. v. Village of Gurnee*, 84 Ill.App.3d 28, 403 N.E.2d 1325, 38 Ill.Dec. 721 (2d Dist. 1980); *Watson Lumber Co. v. Guennewig*, 79 Ill.App.2d 377, 226 N.E.2d 270 (5th Dist. 1967).

73. *Stahelin v. Board of Education, School District No. 4, DuPage County*, 87 Ill.App.2d 28, 230 N.E.2d 465, 470 (2d Dist. 1967).

74. *Bulley & Andrews, Inc. v. Symons Corp.*, 25 Ill.App.3d 696, 323 N.E.2d 806, 809 (1st Dist. 1975); *Watson Lumber Co. v. Guennewig*, 79 Ill.App.2d 377, 226 N.E.2d 270 (5th Dist. 1967).

75. A201 ©1987, ¶7.1.2, 7.2.1; ©1976, ¶12.1.1.

76. *County of Cook v. Harms, supra; City of Elgin v. Joslyn*, 36 Ill.App. 301, 307 (1889); *Stahelin v. Board of Education, School District No. 4, DuPage County, supra.*

77. *Bulley & Andrews, Inc. v. Symons Corp., supra.*

78. *Watson Lumber Co. v. Guennewig*, 79 Ill.App.2d at 391.

79. A201 ©1987, ¶7.3.

80. A201 ©1987, ¶7.4.1.

81. *Walker v. Tucker*, 70 Ill. 427 (1873); *North Shore Sewer and Water, Inc. v. Corbetta Construction Co.*, 395 F.2d 145 (7th Cir. 1968(; *Great Lakes Dredge & Dock Co,. v. City of Chicago*, 267 Ill.App. 46, *rev'd on other grounds*, 353 Ill. 614, 188 N.E. 196 (1932). *See* 84 A.L.R.2d 12 (1962); *W.H. Lyman Construction Co. v. Village of Gurnee*, 84 Ill.App.3d 28, 403 N.E.2d 1325, 38 Ill.Dec. 721 (2d Dist. 1980), *cert. denied.*

82. A201 ©1987, ¶4.3.6; ©1976, ¶¶12.2.1 and 12.3.1.

83. *Foster Construction C.A. v. United States*, 435 F.2d 873 (Ct.Cl. 1970).

84. *J.F. Edwards Construction Co. v. Illinois State Toll Highway Authority*, 34 Ill.App.3d 929, 340 N.E.2d 572 (3d Dist. 1975).

85. *Board of Library Trustees v. Fidelity & Deposit Company of Maryland*, 101 Ill.App.3d 1141, 429 N.E.2d 203, 57 Ill.Dec 552 (3d Dist. 1981) *cert. denied; Consumers Construction Co. v. County of Cook*, 1 Ill.App.3d 1087, 275 N.E.2d 696 (1st Dist. 1971).

86. *Lindberg v. Brandt*, 350 Ill.App. 317, 112 N.E.2d 746 (1st Dist. 1953). A201 ©1987, ©1976, ¶8.2.1. *See J.F. Edwards Construction Co. v. Illinois State of Toll Highway Authority, supra.*

87. *Consumers Construction Co. v. County of Cook, supra.*

88. A201 ¶8.3.4. *Consumers Construction Co. v. County of Cook,* 1 Ill.App.3d 1087, 275 N.E.2d 696, 699 (1st Dist. 1971).

89. *Underground Construction Co. v. Sanitary District of Chicago,* 367 Ill. 360, 11 N.E.2d 361 (1937).

90. *Herlihy Mid-Continent Co. v. Sanitary District of Chicago,* 390 Ill. 160, 60 N.E.2d 882 (1945).

91. *Unicon Management Corporation v. City of Chicago,* 404 F.2d 627 (7th Cir. 1968).

92. *John Kubinski & Sons, Inc. v. Dockside Development Corp.,* 33 Ill.App.3d 1015, 339 N.E.2d 529 (1st Dist. 1975); *Gust K. Newberg, Inc. v. Illinois State Toll Highway Authority,* 153 Ill.App.3d 1918, 506 N.E.2d 658, 106 Ill.Dec. 858 (2d Dist. 1987) *cert. denied* 116 Ill.2d 554.

93. A201 ©1987, ¶8.3.3; ©1976, ¶8.3.4; *Board of Library Trustees v. Fidelity & Deposit Company of Maryland,* 101 Ill.App.3d 1141, 429 N.E.2d 203, 57 Ill.Dec 552 (3d Dist. 1981) *cert. denied; Royal Ornamental Iron, Inc. v. Devon Bank,* 32 Ill.App.3d 101, 336 N.E.2d 105 (1st Dist. 1975); *Nelson v. Pickwick Associate Co.,* 30 Ill.App.333 (1889).

94. *Pathman Construction Co. v. Hi-Way Electric Co.,*65 Ill.App.3d 480, 382 N.E.2d 453, 460, 22 Ill.Dec. 133 (1st Dist. 1978).

95. *M.A. Lombard & Son Co. v. Public Building Commission of Chicago,* 101 Ill.App.3d 514, 428 N.E.2d 889, 57 Ill.Dec. 209 (1st Dist. 1981). *Chicago College of Osteopathic Medicine v. George A. Fuller Co.,* 719 F.2d 1335 (7th Cir. 1983).

96. *Bates & Rogers Construction Corp. v. North Shore Sanitary District,* 92 Ill.App.3d 90, 414 N.E.2d 1274, 1279, 47 Ill.Dec. 158 (2d Dist. 1981). *cert. denied; see also* 74 A.L.R. 3d 187 (1976). *See "No Damage" Clauses in Construction Contracts: A Critique,* 53 Wash.L.R. (1978).

97. *Bates & Rogers Construction Corp. v. Greeley & Hansen,* 109 Ill.2d 225, 486 N.E.2d 902, 93 Ill.Dec. 369 (1985).

98. A201 ©1987, ©1976, ¶9.8.1.

99. *Stone v. City of Arcola,* 181 Ill.App.3d 513, 536 N.E.2d 1329, 1338 (4th Dist. 1989).

100. A201 ©1987, ©1976, ¶9.9.1. The architect certifies the date and

101. A201, ¶9.9.4.

102. *Kangas v. Trust,* 110 Ill.App.3d 876, 441 N.E.2d 1271, 65 Ill.Dec. 757 (2d Dist. 1982); *MaGirl v. Hastings,* 120 Ill.App. 276 (1905).

103. *Watson Lumber Co. v. Guennewig,* 79 Ill.App.2d 377, 226 N.E.2d 270 (1967).

104. *George Butkovich & Sons, Inc. v. State Bank of St. Charles,* 62 Ill.App.3d 810, 379 N.E.2d 837, 20 Ill.Dec. 4 (2d Dist. 1978); *J-M Builders & Suppliers Corp. v. McIntyre,* 56 Ill.App.3d 714, 372 N.E.2d 420, 14 Ill.Dec. 409 (2d Dist. 1978).

105. *Brewer v. Custom Builders Corp.,* 42 Ill. App. 3d 668, 356 N.E.2d 565, 1 Ill.Dec. 377 (5th Dist. 1976). *See also Kusy v. Johnson,* 41 Ill.App.3d 763, 354 N.E.2d 480 (3d Dist. 1976).

106. *W. E. Erickson Construction, Inc. v. Congress-Kenilworth Corp.,* 115 Ill.2d 119, 503 N.E.2d 233, 104 Ill.Dec. 676 (1987).

107. *South Beloit Electric Co. v. Lar Gar Enterprises, Inc.,* 80 Ill.App.2d 367, 224 N.E.2d 306 (2d Dist. 1967).

108. *Spiro v. Cable,* 248 Ill.App. 343 (1928).

109. *Kenny Construction Co. v. Hinsdale Sanitary District,* 111 Ill.App.3d 690, 444 N.E.2d 510, 515, 67 Ill.Dec. 274 (1st Dist. 1982); *Watson v. Auburn Iron Works, Inc.,* 23 Ill.App.3d 265, 318 N.E.2d 508, 511 (2d Dist. 1974).

110. A201 ©1987, ©1976, ¶9.7.1. *F.E. Holmes & Sons Construction Co., Inc. v. Gualdoni Electric Service, Inc.,* 105 Ill.App.3d 1135, 435 N.E.2d 724, 61 Ill.Dec. 883 (5th Dist. 1982). *Spiro v. Cable,* 248 Ill.App. 343 (1928).

111. *Horton Indrustrial, Inc. v. Village of Moweaqua,* 142 Ill.App.3d 730, 492 N.E.2d 220, 227, 97 Ill.Dec. 17 (5th Dist. 1986).

112. *Ill. Rev. Stat.,* ch.82, P5.

113. *H.W. Jaeger & Assoc. v. Slovak American Charitable Organization,* 156 Ill.App.3d 106, 507 N.E.2d 863, 865, 107 Ill.Dec. 710 (2nd Dist. 1987).

114. A201, ©1987, ¶9.71; ©1976, ¶9.6.1.

STUDENT INJURIES: LIABILITY FOR PERSONAL INJURIES OCCURRING DURING EXTRACURRICULAR ACTIVITIES

Donald B. Bowerman
Hibbard, Caldwell, Bowerman & Schultz
Oregon City, Oregon

Today, public schools can be described as society's surrogate parents with the added element of tort liability. Although the courts have substantially eroded the common law rule of parental tort immunity, the parent-child relationship still acts to limit the number of tort cases between family members.[1] On the other hand, the student-teacher relationship presents no such social barrier. Thus, it is not surprising that while schools are taking on more of the social responsibility of parenting, students are bringing an increasing number of negligent injury suits against them. Of this expanding sphere of liability, one of the fastest growing areas is that of school accountability for injuries occurring during extracurricular activities.

HISTORY OF EXPANDING SCHOOL LIABILITY

Initially, sovereign immunity worked to insulate schools from negligence liability. As early as fifty years ago it was not uncommon to find states where sovereign immunity, for all intents and purposes, barred an injured student from holding a school financially liable for its negligent actions.[2] However, in recent years, courts and legislatures have abrogated many of the harsh results dealt by sovereign immunity by limiting its coverage to stated dollar amounts or in some cases the extent of the defendant's insurance.[3] Today, schools can no longer expect to hide behind the shield of sovereign immunity for protection from negligence liability.

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In addition to statutory limits, the courts have historically limited school liability through the legal question of duty. However, over the last fifty years, this, too, has become less of a bar to potential negligence claims.

After the lifting of statutory immunity, courts quickly allowed negligence actions against schools to proceed upon the breach of two general duties. First, using a property analysis, schools were found to owe students and others a duty to maintain the school premises in a safe condition.[4] Second, schools were held to a duty to properly supervise activities on campus and during school hours.[5] A majority of cases in this area arise out of improper instruction or supervision in physical education classes.[6] Recently, courts have been willing to hold schools to a duty of care that reaches beyond its walls and outside the realm of its official activities. Additionally, and under proper circumstances, courts have gone as far as to hold schools responsible for the intentional acts of third parties.

CONDITION OF BUILDING, PREMISES AND EQUIPMENT

The most familiar form of liability arising from the condition of the school premises is the simple "slip and fall" case. This occurs when a student is injured by an unreasonable hazard, such as a hole in the playground or a badly maintained sidewalk.[7]

However, condition-of-the-premises liability is not limited to injuries which occur during official school hours or activities. In *Stahl v. Cocalico School District*,[8] a young student was killed when he fell through a skylight on the roof of the school. The 12-year old boy had climbed onto the roof to retrieve a baseball. Although

this occurred on a Sunday, an appeals court held that allegations of school officials' awareness of students climbing onto the low roof put the officials on notice as to the possibility of this kind of injury and, thus, were responsible to take precautionary measures.

Another extracurricular condition-of-the-premises injury case, this time including a piece of athletic equipment, is found in *Massie v. Persson*.[9] In *Massie*, a football coach had modified a single-person whirlpool to accommodate more people. While using the whirlpool, two students were electrocuted, one fatally. The court found the coach responsible for the death because, while modifying the whirlpool, he had failed to ground it correctly. For reasons unknown, the plaintiffs in *Massie* failed to join the school district as a defendant, and thus the school was not held liable for the death. However, under the doctrine of *respondeat superior* a school in a case like *Massie* would most likely be held accountable for the actions of its employees.

LACK OF SUPERVISION

By far, the majority of negligent injury cases brought against schools arise out of the failure of school officials to properly supervise their students (during in-school or during extracurricular) activities. It is evident from the cases in this area that the level of supervision necessary increases as the risk of physical injury inherent in the activity increases. Where as it is unlikely that a student will be injured in math class, the risk of injury greatly increases when the student is involved in athletic activities. Because of the infinite variety of injury-causing scenarios and the lack of predictability of young students, it is difficult to find a consensus on what constitutes reasonable supervision. In student injury cases, the claim is made that the injury was avoidable if better supervision had been provided. Thus, the circumstances become the measure of the reasonableness of the supervision.

In *Cirillo v. City of Milwaukee*,[10] a high school physical education teacher left approximately 50 boys in a gym unsupervised for approximately 25 minutes. The boys were left with the instruction to "shoot around" with basketballs; however, the game soon deteriorated into a game of keep away. During the course of the game, the students kept a look-out for the return of the teacher because if the teacher "had looked in on us the game would have been stopped because we were playing too rough."[11] Subsequently, while the teacher had yet to return, an injury occurred, thus, leading to a suit against the teacher and the school. The Wisconsin Supreme Court held it was a jury decision on whether or not the teacher acted unreasonably in leaving the class unsupervised for such a length of time. The court specified such unreasonableness was to be measured in light of the number of students, their ages and their inherent unruly propensities.[12]

However, an absent teacher does not conclusively prove negligence if the cause of injury is unforeseeable. In *Halland v. Scott*,[13] a student was injured when hit in the eye by a nail impulsively thrown by another student. Although the teacher was absent from the room at the moment the nail was thrown, the South Carolina Supreme Court in holding for the school concluded:

> It is . . . impossible for a teacher to personally supervise each student every moment of the school day. A teacher must rely - to some extent - on the responsibility and maturity of his students to conduct themselves in a proper and safe manner.[14]

It is not necessary for a teacher to be absent in order for the school to be held liable for injuries caused by improper supervision. An example of such a case is *Smith v. Archbishop of St. Louis*.[15] In *Smith*, a second grade teacher had lit on her desk a candle in dedication to the Mother of Jesus. However, the teacher took no precautions to insure that the students did not come in contact with the lit candle. While her students were preparing to perform a class play and while she was in a different part of the classroom, one of the students, already in a feather-covered costume, backed into the lit candle, setting the costume on fire. The Missouri Court of Appeals upheld a $1.75 million dollar award for the plaintiff, reasoning that the age of the students and the risk involved indicated that the teacher "failed to exercise reasonable care in supervision of young children in her charge."[16]

The majority of injury actions, based on failure to adequately supervise, arise out of physical education classes or athletic activities. An example of a case where not only was there the omission of proper supervision, but also the

act of improper instruction is *Stehn v. Bernarr MacFadden Foundation, Inc.*[17] In *Stehn*, a wrestling coach instructed his students in a manuever that was not recognized or approved by qualified wrestling experts. Another wrestler inflicted this maneuver upon the plaintiff, causing neck and spinal cord injuries.

INJURIES OFF-CAMPUS OR DURING UNOFFICIAL ACTIVITIES

One of the fastest growing areas of school negligence law is that of school liability for extracurricular activities, official or unofficial, occurring off the school premises. Cases arising in this area are often an extension of the lack of adequate supervision theory. Also, these cases are best understood when viewed in relation to the old common law distinction between nonfeasance and misfeasance.

In the context of school liability, a school may be found to have breached its duty to its student by either failing to have adequate rules and procedures in place at all (nonfeasance) or by improperly executing those procedures after they are in place (misfeasance).

Morris v. Douglas County School District No. 9,[18] presents an early example of the extension of the failure to adequately supervise theory to activities occurring off the school grounds. In *Morris*, a 6-year old child was seriously injured while on a field trip to the beach. The supervising teachers posed four students on a log located on the beach and then turned her back on the ocean in order to take motion pictures of the children on the log. During the filming, a large wave came onto the shore moving the log and causing one of the children to fall under it on the seaward side. As the water receded, the log rolled back into its original position trapping the child underneath. The Oregon Supreme Court agreed with the trial court and held under the combined circumstances that unpredictability of the ocean and the children's natural tendency to play around logs evidenced that the teacher "was negligent in failing to exercise proper supervision at the specific time of the accident."[19]

This case also presents an example of misfeasance. The teacher was not alone in supervising the children on this particular outing. She was assisted by six other adults, including the mother of the injured child.[20] The school was following a planned course of supervision; however, in this particular instance this planned supervision fell short of the required level to avoid liability.

Another example of nonfeasance can be seen in *Broward County School Board v. Ruiz*.[21] In *Ruiz*, three students attacked and beat the student plaintiff to unconsciousness while the plaintiff was waiting in the school cafeteria, after school hours, to be picked up by his father. It was revealed at trial that the school was aware of students congregating on the premises after hours, yet failed to provide any supervision. The district, in fact, had taken no action to provide any supervision, although a custodian would sometimes oversee the activities of the students on an *ad hoc* basis. The appeals court let stand a $30,000 verdict, stating there was sufficient evidence for the jury to find a breach of the school's duty to supervise properly.

One of the more unusual cases involving school liability for students involved in unofficial activities is found in *Lynch v. Board of Education*.[22] In *Lynch*, a female high school student brought a suit against her school for injuries incurred during a "powder puff" football game. Although the school took affirmative steps to distance itself from the event and the Illinois Supreme Court refused to find the activity expressly authorized,[23] the court went on to affirm the trial court verdict for the plaintiff, basing its decision on the agency theory of apparent authority. The court concluded the actions of teachers in close proximity to the game gave the game the appearance of an authorized activity. Thus, the court held the mere appearance of approval of an activity gives rise to liability for injury caused during the activity if the injury could have been avoided by the school providing proper supervision or instruction.

Another odd case is that of *Verhel v. Independent School Dist. No. 709*.[24] In *Verhel*, a school district was held liable to a high school cheerleader who was injured in an automobile accident while "bannering" football players' homes. The accident occurred approximately 5:00 a.m. in the morning after the plaintiff and fellow cheerleaders had been up most of the night. The court affirmed a jury verdict for the plaintiff, holding (under comparative negligence) the school 35% negligent for inadequate supervision.[25]

Schools are not, however, always held responsible for injuries during extracurricular activities. In *Benitez v. New York City Bd. of Educ.*,[26] the appeals court overturned a jury ver-

dict for the plaintiff who had suffered a paralyzing injury during a football game. The court held the school district did not owe the student a higher duty of care than that of a prudent parent and the plaintiff had failed to establish any breach of such a duty.[27] In addition, the court held the plaintiff was barred from recovery because he assumed the risks of the game. He was aware of such risks and was not under an inherent compulsion to play.[28]

Also, in the case of *Rollins v. Blair*,[29] the Montana Supreme Court upheld summary judgment in favor of the school district where a cheerleader, who was injured at a private cheerleading clinic, brought action against the district. The student contended that the school owed her a duty of adequate supervision while attending the clinic because the school had provided transportation and that other students and faculty had selected her to be a cheerleader.[30] The court disagreed and held the facts insufficient to create such a duty.

> The cheerleading camp was run by private parties independent of the school district. It would be improper to hold that [the district] had a duty of supervision to [the student] for an extracurricular activity during the summer months which was governed by independent parties.[31]

The decision in *Rollins* satisfies one's internal sense of justice, but points out the difficulty in predicting exposure to school districts since the courts seem to decide these issues of duty on a case-by-case basis. However, two Washington cases, one imposing liability and the other not, may shed some light on this mysterious judicial process.

First, in *Chappel v. Franklin Pierce School District No. 402*,[32] the Washington court reversed a trial court ruling dismissing the action in a case involving an injury which occurred during a "Key Club" initiation ceremony. The Key Club was a school authorized extracurricular organization and included a faculty supervisor.[33] The ceremony took place off school grounds and after school hours in violation of an unwritten school regulation.[34] In addition, at the last moment, the school advisor notified the group that he would be unable to attend the event. However, the parent of the club member who had volunteered his house was present during the meeting.[35] During the initiation, one of the students suffered a fractured ankle while performing an "illusory leap trick" on a sloping surface. The advisor later testified that he would not have allowed the trick on uneven ground.[36]

The court held:

> [w]here, as here, the evidence reveals that educational and cultural values inherent in the normal activities of an extracurricular student body organization, and the school administration has assumed supervisory responsibility over the organization which, in turn, extends to tacit approval of and faculty participation in planning and supervising off-campus initiation ceremonies involving physical ordeal, the school cannot relieve itself of potential tort liability....[37]

Second, in the case of *Rhea v. Grandview School Dist. No. Jt 116-200*,[38] the court affirmed summary judgment for the school district in a case where a student was killed in a traffic accident after consuming alcohol during an off-campus senior "release day" party. Previous to the release day, the senior class held a meeting to plan the days activities. However,when the group discussed obtaining alcohol for the event, the faculty advisor present, but not participating at the meeting, admonished the students and reported the incident to the principal. On the release day, a number of students including the student killed attended a party and proceeded to consume alcoholic beverages. No school employees were present at the party. While driving home, the student was killed in a car-truck collision. At the time of the accident, the student's blood alcohol level was 0.13 percent.[39] The court distinguished *Chappel* stating that:

> [h]ere, no District employee or agent was present at the party or participated in any way with its planning. In fact, the faculty adviser expressly registered her disapproval of the students' plans. Nor, can it be said the District's nonaction constitutes "tacit approval and faculty participation" in the activity. [citations omitted] Even when viewed in the light most favorable to the nonmoving party, it cannot be said that mere knowledge by a fac-

> ulty adviser and principal brought the senior party within the scope of the District's authority.[40]

These two cases, although distinguishable on their facts, reveal three factors used by the court to determine if the extracurricular activity fell within the district's scope of authority and, thus, gave rise to a duty to supervise. First, the activity must have had educational and cultural values rising to a "normal" level for school extracurricular activities.[41] Although this is somewhat vague terminology, the Key Club is clearly a normal type of school sponsored activity encompassing widely recognized educational and cultural values, whereas a release day party including alcohol clearly is not.

Second, the court looked to what extent school administrators had assumed supervisory responsibility over the organization. Here, in both cases, there is a level of administrative approval of the organizations although the court in *Rhea* attaches little weight to the fact that the party was planned during school hours on school premises and under the guise of an authorized senior class advisor.[42]

Third, the court determines if the administration through its agents has (1) extended tacit or express approval to the organization's plans, (2) participated in planning activities, and (3) provided actual off-campus supervision.[43] Here again, the facts of *Chappel* present a situation where the school administration approved, at least tacitly, the organization's plans, the faculty advisor participated in those plans, and the advisor was to supervise the activity.[44] However, in *Rhea*, none of these factors appear to be present.

VICARIOUS LIABILITY FOR *UNAUTHORIZED* CONDUCT — FROM WHAT DISTANCE MUST AN EMPLOYER RESPOND?

If you are comfortable in your understanding that an employer is only liable under the doctrine of *respondeat superior* for the conduct of employees who are acting within the course and scope of their employment, you should squirm a bit when presented with a sexual molestation case.

If the employee's conduct is within the course and scope of his employment, liability has been imposed upon the employer for willful and malicious torts, as well as negligence, under the doctrine of *respondeat superior*.

In *Martinez v. Hagopian*,[44a] (1986, 182 Cal. App.3d 1223, 1228, 227 Cal. Rptr. 763), the court stated:

> The determination as to whether an employee committed a tort during the course of his employment turns on whether (1) the act performed was either required or 'incident to his duties,' or (2) the employee's misconduct could be reasonably foreseen by the employer in any event. The employee's actions need only fall within the range of actions covered by either part of the two prong test for the employer to be held liable.

Clearly, sexual molestation of students is not a part of a teacher's duties that should create liability upon the school district. The arguments advanced by the plaintiffs in imposing liability pick up the holding in *White v. County of Orange*,[44b] (1985, 166 Cal. App3d. 566, 212 Cal. Rptr. 493). *White* involved an action by a women against a deputy sheriff who kidnapped her while he was on patrol in uniform in a marked patrol car. The court held that the employer was responsible for acts done during the exercise of the employee's authority. The plaintiff in *White* claims she would not have stopped her car had it not been for the deputy's use of his apparent authority by activating the flashing lights of the patrol car.

In the recent case of *John R. v. Oakland Unified School District*,[44c] (1989, 256 Cal. Rptr. 766, 769 P2d 948), it was argued that a math teacher engaged a junior high student in an officially sanctioned instructional work experience program which involved extra curricular work at the teacher's home. The student was to assist in grading papers, and while doing so, the teacher convinced the student that engaging in sexual acts would help him with his "problems." It was alleged that the acts took place solely because of the existence of the relationship of teacher and pupil. The analogy between the authority of the police officer in White and the teacher's authority over the student was employed to claim that the sexual assault became possible due to the relationship of teacher and

student created by the school district, albeit extra curricular and off campus. It was argued that the court should not focus on whether the teacher's sexual activity with the student is either "characteristic" or foreseeable, but rather whether the assault arose out of the exercise of job created authority by the teacher over the student.

The court in *John R.* held without over ruling *White* that the court of appeals erred in looking at the factual similarities between *John R.* and *White,* and that it failed to consider whether the underlying justification for the *respondeat superior* doctrine would be served by imposing vicarious liability on the district. The court held that the police officer's authority over a motorist bolstered by his uniform, badge and firearm plainly surpasses that of a teacher over a student. The court said that imposing the doctrine of *respondeat superior* to school districts for the sexual misconduct of its employees would in effect be creating strict liability in that context and would deter school districts from the legitimate practice of encouraging one-on-one contacts between teachers and students and adversely affect the educational process.

Under *John R.,* the court concluded that although the facts of the case can be made to fit a version of the *respondeat superior* doctrine, the court was not persuaded that they should be, or that the doctrine is appropriately invoked under these circumstances. The court carefully analyzed the underlying rational for the *respondeat superior* doctrine and felt under the teacher/pupil fact situation the rational failed.

In *Kimberly M. v. Los Angeles Unified School District,* [44d] (1989, 263 Cal. Rptr. 612), a five year-old student at an elementary school was molested by her teacher after the student complied with the teacher's order to undress. The allegations were that the teacher, in the course of her contractual duties with the district, maintains strict order in the classroom during classroom hours and that the students were obligated to comply with her rules, directives and orders. Although the facts in *Kimberly M.* are distinguishable from *John R., supra,* in that *Kimberly M.* was five years of age, and the student in *John R.* 14 years, the degree of compliance by the younger student would be substantially greater, and the molestation in *Kimberly M.* took place on the school premises as opposed to the teacher's home in *John R.* It could be argued that the public school not only granted the teacher the authority which she used to molest *Kimberly M.,* but also supplied the physical and supervisoral environment in which the molestation took place. It also could be argued that *Kimberly M.* is more analogous to *White, supra,* in that the degree of authority by a teacher over a five year old is more closely analogous to a police officer over a citizen.

Notwithstanding these observations, the California Supreme Court directed the court of appeals to vacate its opinion and reconsider in light of *John R.* It is to be noted, however, that the opinion in *John R.* was written over two separate and significant dissents of Justices Mosk and Kauffman. A concurring opinion in *Kimberly M.* urges the Supreme Court to reconsider the "broad brush" holding in *John R.* and quips that in California "it makes no difference how much authority the teacher wheels over the student, how vulnerable the student is, or where the sexual abuse occurs."

EXCULPATORY CLAUSES

One popular way of combating the rising tide of negligence claims associated with voluntary activities is the use of exculpatory clauses, or release forms. However, courts have been reluctant to enforce such clauses when they hold such clauses violate public policy. In the recent case of *Wagenblast v. Odessa Sch. No. 105-157-166J,*[45] the Washington Supreme Court barred two school districts from requiring students sign a negligence release form before being allowed to participate in extracurricular activities. The court, adopting the California public policy test found in *Tunkl v. Regents of Univ. of Cal.,*[46] held that when a "service is one of importance to the public... a certain standard of performance is therefore required," and because the extracurricular services of a public school are of such importance, schools will not be released by contract from their liability.[47]

INTENTIONAL ACTS INFLICTED BY THIRD PARTIES

One of the most recent developments in school negligence law and possibly the most controversial is a school's liability to a student for injuries inflicted by the intentional acts of third parties. The Oregon Supreme Court recently made a substantial shift in negligence policy concerning school liability and the intentional acts of third parties in *Fazzolari v. Port-*

land School District No. 1J.[48] In *Fazzolari*, a high school student was beaten and raped just outside the school building after her mother had dropped her off one hour before classes were to begin. The Oregon Supreme Court held the plaintiff stated a cause of action because the question of liability turned on the factual issue of foreseeability and reasonableness of school action in light of surrounding circumstances. The surrounding circumstances in *Fazzolari* included a previous raping near campus just a few weeks earlier. The earlier attack occurred at 4:00 a.m. to a paper-carrier/non-student, and the school elected not to warn students of that event.

The holding in *Fazzolari* can be seen in striking contrast to a holding made just months earlier by the Oregon Court of Appeals in *Cook v. School District UH3J*.[49] In *Cook*, students from a rival high school attacked and injured the student plaintiff while attending an evening basketball game. The court, while dismissing the complaint, held the plaintiff had not alleged sufficient facts to show foreseeability of the injuries incurred, and therefore, the district had no legal duty to provide protection. *Cook* is an example of the court using the legal element of *duty* to limit a defendant's liability when the injuries incurred and the method by which they were inflicted were too remote, and therefore, unforeseeable.

It should be noted, however, that the Oregon Supreme Court's holding in *Fazzolari* substantially eliminated the reasoning used in *Cook* by effectively removing the element of duty from negligence claims and used the foreseeability test as its measure.

Other cases involving injuries caused by the intentional acts of third parties are *Ha-Sidi v. South Country Central School District*[50] and *Bonner v. City of New York*.[51] In *Ha-Sidi*, a student was injured when, after asking assistance from a nearby teacher and having the teacher fail to respond, he attempted to break up a fight between two other students. The school district was held not liable in this specific case because, the court held, the altercation between the two fighting students was not so serious as to warrant intervention. In *Bonner*, however, a teacher who left his post guarding a broken gate in the school playground fence in order to break up a fight was himself injured by one of the individuals involved in the fight. In this case, the person involved in the altercation and inflicting the injury upon the teacher was not a student. After the teacher had broken up the fight and physically removed the non-student from the school grounds, the non-student returned through the now unguarded gate and assaulted the teacher with a baseball bat. The teacher then brought suit against the board of educators for injuries suffered. The teacher based his claim of negligence on the board's failure to fix the broken gate. The court held, in this particular case, the school owed no duty of care to the teacher; however, the outcome could have been different if it was a student that had been assaulted.

INJURIES CAUSED BY VIOLATION OF CLOSED CAMPUS

A line of cases has developed around a school district's liability for injuries to truants. An example of liability to a truant through misfeasance can be seen in *Bryant v. United States*.[52] In *Bryant*, three Navajo boys suffered severe frost bite after running away from a Bureau of Indian Affairs boarding school. The opportunity to escape the school unnoticed was afforded to the students by the failure of a dormitory supervisor to perform his prescribed duties. The circuit court of appeals upheld a $30,000 verdict for each of the plaintiffs holding the failure to properly implement reasonable, prescribed supervision was the proximate cause of the plaintiffs' injuries.

A similar case, but one likened to nonfeasance, is *Hoyem v. Manhattan Beach School District*.[53] In *Hoyem*, a summer school student left the school premises without permission and was subsequently struck and injured by a motorcycle. The California Supreme Court held that a school not only had the duty to properly *execute* procedures to inhibit students from leaving campus which might further lead to injury, but also had the duty to *establish* reasonable procedures to prevent such unauthorized departures.

VIOLATIONS OF CIVIL RIGHTS

Schools are held to standards of care above and beyond those of every day citizens because of their unique responsibility and their affiliation with the State. One of these standards is that imposed by civil rights legislation, specifically 42 USC, § 1983. Often, civil rights suits against schools arise as a result of their role as an employer. An example of this can be found in *Mount*

Healthy City School District v. Doyle.[54] Although the Supreme Court in *Doyle* did not base its decision on § 1983, it did let stand a nonstatutory claim for violation of constitutional rights where the plaintiff, Doyle, was denied tenure based upon his union activities protected under the First Amendment.

However, suits against schools arising out of violations of civil rights are not limited to the employer/employee relationship. In *Wood v. Strickland*,[55] several students brought an action against their school for violation of their due process rights. The school had suspended the students for violating a regulation against bringing and using intoxicating beverages on school grounds. The Supreme Court, while holding for the school district, concluded that under § 1983 school officials are immune from suits alleging violations of civil rights if they act "in the good faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances."[56]

In addition, a student can bring a § 1983 action when the alleged injury occurs during an extracurricular activity. In the recent case of *Stoneking v. Bradford Area School District*[57] (remanded on other grounds, see discussion, *infra*), a student was sexually abused by her band instructor. These abuses took place during extracurricular, as well as in-school band activities. The school principal had received an early report from another student concerning a sexual advance made by the instructor but failed to investigate. The litigating student claimed that the school's failure to adopt preventative measures in light of the earlier report violated her civil rights.[58]

However, the Supreme Court remanded *Stoneking*, in light of its decision in *DeShaney v. Winnebago County Department of Social Services*.[59] *DeShaney* limits the scope of § 1983 claims when allegations involve violations of substantive due process by state *inaction*.

DeShaney involved a child who was severely injured by his abusive father. For a period of two and one half years the defendant, a state organization entrusted with investigation and protecting abused children, received numerous reports that the father was abusing the child. However, the defendant failed to take affirmative action to protect the child. The father finally beat the child so severely as to leave him permanently brain damaged. The mother of the child then brought suit on behalf of the child against the defendant alleging that its failure to act deprived her son of liberty without "due process of law."[60]

The majority, while upholding summary judgment for the defendant, found, first, that the purpose of the Due Process Clause

> was to protect the people of the State, not to ensure that the State protect[] them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.[61]

Second, the majority found that only in limited situations would the Due Process Clause impose an affirmative duty upon the State to take action. The Court stated that when

> [t]he State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide his basic human needs — e.g., food, clothing, shelter, medical care, and reasonable safety — it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.[62]

The cases used to support this proposition involve jailed inmates and persons voluntarily committed.[63]

On remand in *Stoneking*, the Third Circuit did not decide whether the state's mandatory attendance law created a duty on the part of the school to protect students, but instead found that the plaintiff had alledged another basis for a viable § 1983 claim — that the defendants with deliberate indifference to the consequences, established and maintained a policy, practice or custom of reckless indifference to instances of known or suspected sexual abuse of students by teachers which directly caused her constitutional harm, i.e., violation of her right to be free from invasion of her personal integrety. On this basis the court denied qualified immunity from liability to the principal and assistant principal in their personal capacities. The court of appeals did not address the issue of the school district's liability.[64]

CONCLUSION

Today's schools face a rising tide of negligence claims resulting from their involvement in official (and sometimes unofficial) extracurricular activities. Often the most innocent and routine conduct taken by teachers or administrators can give rise to liability claims in areas where schools have never before considered themselves at risk. School officials must be alert to the potential pitfalls inherent in their extracurricular programs and develop preventative policies. The adoption of such policies should, first, reduce the risk of injury to the student by providing proper supervision when needed and, second, insulate the school from liability when the unavoidable student injury does occur.

END NOTES

1. *See* Scmidtman, *The Demise of Parent-Child Tort Immunity*, 12 Willamette Law Journal, 605,609 (1976).

2. *See Lovell v. School District No. 13, Coos County*, 172 Or. 500, 143 P.2d 236 (1938); See also Harty, *School Liability for Athletic Injuries: Duty, Causation and Defense*, 21 Washburn Law Journal 315, 330 (1982), for a more complete discussion of the history of sovereign immunity and the public school.

3. *See generally, Modern Status of Doctrine of Sovereign Immunity as Applied to Public Schools and Institutions of Higher Learning*, 33 ALR3r 703.

4. *See Tort Liability of Public Schools and Institutions of Higher Learning for Accidents Due to Condition of buildings or Equipment*, 34 ALR3rd 1166; *Tort Liability of Public Schools and Institutions of Higher Learning on Premises for Accidents Occurring During Use of Premises for Other Than School Purposes*, 37 ALR3rd 712.

5. *See Tort Liability of Public Schools and Institutions of Higher Learning for Accidents Occurring during School Athletic Events*, 35 ALR3rd 725, § 9; *Liability of Public Schools and Institutions of Higher Learning for Injuries Due to Condition of Grounds*, Welks, 2nd, Playgrounds, 37 ALR3rd 738.

6. *See* Harty, *School Liability for Athletic Injuries: Duty Causation and Defense*, 21 Washburn Law Journal; 315 (1982); *Tort Liability of Public Schools and Institutions of Higher Learning for Accidents Occurring in Physical Education Classes*, 36 ALR3rd 361.

7. *See Levie v. Orleans Parish School District*, 537 S.2d 351, 51 Educ.L. Rptr. 682 (La. App. 1988) (12 year old student was injured when she caught her foot in a hole that was hidden by tall grass. The court held this presented an unreasonable hazard and, therefore, held the school liable).

8. 534 A.2d 1141 (Pa. Commonwealth 1987).

9. 729 S.W.2d 448 (Kentucky App. 1987).

10. 34 Wis.2d 705, 105 N.W.2d 46 (1967). *See also* Henderson, *Negligent Liability Suites Emanating from the Failure to Provide Adequate Supervision; a Critical Issue for Teachers and School Boards*, 16 Journal of Law and Education 435, 439 (Fall, 1987); *Ragnone v. Portland School District No. 1J*, 291 Or. 617, 633 P.2d 1287 (1981), school district held liable for injury to 61-year old nonstudent licensee traversing gym occupied by unsupervised physical education class.

11. *Cirillo* at 465.

12. *Id.* at 466.

13. 232 S.E.2d 336 (S. Carolina 1977).

14. *Id.* at 339.

15. 632 S.E.2d 516 (Mo. App. 1982); see, *Henderson, supra.*

16. *Id.* at 22.

17. 424 F.2d 811 (6th Cir. 1970); see, also, Harty, *School Liability for Athletic Injuries; Duty, Causation and Defense*, 21 Washburn Law Journal, 515 (1982).

18. 241 Or 23, 403 P.2d 775 (1965)

19. *Id.* at 27.

20. *Id.* at 24.

21. 493 S.2d 474 (Florida 4th DCA 1986); See, also, Tamburello, *School Board's Duty to Provide Supervision Does Not End When the Class Bell Rings,* 16 Stetson Law Review 104.

22. 82 Ill.2d 415, 412 N.E.2d 447 (1980); see, also, *Teacher's Apparent Authority Render School District Liable for Negligence,* 30 DePaul Law Review 537 (1981).

23. *Id.* at 434, 412 N.E.2d at 559.

24. 359 N.E.2d 579 (Minn. 1984).

25. *Id.* at 583.

26. 543 N.Y.S.2d 29 (Ct. App. 1989).

27. *Id.* at 32.

28. *Id.* at 32-33.

29. 767 P.2d 328 (Mont. 1989).

30. *Id.* at 330.

31. *Id.*

32. 426 P.2d 471 (Wash. 1967).

33. *Id.* at 472.

34. *Id.*

35. *Id.* at 473.

36. *Id.*

37. *Id.* at 475.

38. 649 P.2d 666 (Wash. App. 1985).

39. *Id.* at 667.

40. *Id.* at 669.

41. *Chappel* at 475.

42. *Rhea* at 667.

43. *Chappel* at 475.

44. *Id.* at 473.

44a *Martinez v. Hoqopian,* 44a (1986, 182 Cal. App.3d 1223, 1228, 227 Cal. Rptr. 763).

44b *White v. County of Orange,* 44b (1985, 166 Cal. App.3d 566, 212 Cal. Rptr. 493).

44c *John R. v. Oakland Unified School District,* 44c (1989, 256 Cal. Rptr. 766, 769 P2d 948.)

44d *Kimberly M. v. Los Angeles Unified School District,* 44d (1989, 263 Cal. Rptr. 612).

45. 110 Wash.2d 845, 758 P.2d 968 (1988).

46. 60 Cal.2d 92, 383 P.2d 441, 32 Cal. Rptr. 33, 6 A.L.R.3d 693 (1963).

47. *Id.* at 851, 758 P.2d at 970.

48. 303 Or. 1, 734, P.2d 1326 (1987).

49. 83 Or. App. 292, 731 P.2d 443 (1987).

50. 539 N.Y.S.2d 47, 52 Education Law Rptr. 695 (A.D. Second Department 1989).**

51. 539 N.Y.S.2d 728, 52 Educational Law Rptr. 1198 (Ct. App. 1989).**

52. 565 F.2d 650 (10th Cir. 1977).

53. 150 Cal. Rptr. 1, 585 P.2d 851 (1987); see, Harutunian, *Hoyem v. Manhatten Beach City School District;* School District Liability for Injury to Truants, 68 Ca. Law Review 881 (1980).

54. 429 U.S. 274 (1972); see, also, Morgenstern, *Tort and Civil Rights Liability of Education,* 10 Ohio Northern University Law Review 21 (1983).

55. 420 U.S. 308 (1975).

56. *Id.* at 321; see, also, Morgenstern at 33.

57. 856 F.2d 594 (CA.3rd 1988), remanded in light of *DeShaney,* 109 S. Ct. 1333 (1989).

58. *Id.* at 596.

59. 109 S. Ct. 998 (1989).

60. *Id.* at 1002.

61. *Id.* at 1003.

62. *Id.* at 1006-7.

63. *Id.* at 1005; citing to *Youngblood v. Romeo,* 102 S. Ct. 2454 (1982) (involving an involuntarily committed mental patient); *Estelle v. Gamble,* 97 S. Ct. 285 (1976) (involving a prison inmate.)

64. 822 F.2d 720 (3d Cir. 1989), *cert. denied,* 58 U.S.L.N. 3449 (No. 89-780) (U.S. Jan. 16, 1990)..

* Denotes source of case brief from *Ways to Avoid Negligent Suits,* Volume 5, No. 4, "A Word On ..." (NSBA Newsletter, August, 1989).

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William Ohle
Williamette University
College of Law.

INSURANCE ISSUES: TRENDS, COVERAGE, AND DESIGNATION OF COUNSEL

Sheldon W. Grasley
Pennsylvania School Boards Association
New Cumberland, Pennsylvania

TRENDS

Whether or not sufficient coverage is available, and at what price, this year will be determined by how successful insurance companies have been during the last several years. As a result of the hard market of 1986, with prices skyrocketing and coverages deteriorating, insurance companies in general were able to improve their capital positions, triggering mild competition during 1988 and 1989. Losses created by several catastrophes during 1989, as well as understated loss reserves, may begin to deteriorate capital positions and lead to price increases during 1990. Losses resulting from Hurricane Hugo, for example, are now believed to be well in excess of the original $4 billion estimate. [1]

Many insurance company spokesmen are predicting price increases for 1990. John P. Grady, senior vice-president of CIGNA Insurance Company is quoted in the January 8, 1990 issue of the *National Underwriter* as saying that his company will have rate increases and that they will be determined on an individual account basis. Jack Mosely, chief executive officer of USF & G, said in that same article that "we have been monitoring the insurance markets for the opportune time to raise prices. We believe that time is now." Jeff Greenberg, president of National Union, stated that the industry needs corrective action now so as to avoid the dramatic price increases seen in 1986.[2]

It does seem clear that the insurance marketplace will see price increases, during 1990. It does not appear, however, that there will be large across-the-board increases, but rather intelligent changes in pricing (when compared to 1986) based on the loss experience of individual accounts by line of coverage.

Most brokers are predicting prices will continue to be stable during early 1990. They further indicate there is no general trend of tightening of capacity or restrictions of coverage terms and conditions in either property or casualty lines. It is important to note, however, that some brokers are adopting a "wait and see" attitude, predicting that prices will climb after insurers release their fourth quarter 1989 results and complete their reinsurance treaties. [3]

Coverages which were removed or greatly restricted during the hard market continue to be troublesome. It is still difficult to purchase general liability coverage for asbestos or clean up of sudden or accidental pollution. Limited coverage, usually $10,000, is available for pollution clean up on school property but no protection is typically afforded for third party property damage or bodily injury.

Underground Storage Tanks

One of the many challenges facing public schools across the country today is the requirement imposed by the U.S. Environmental Protection Agency to provide assurance that individual school districts can show financial responsibility for the liabilities created by using underground tanks. Current regulations state that schools (local governments) must be in a position to demonstrate their ability to satisfy obligations up to $500,000 or $1,000,000 per occurrence, depending on the number of gallons used monthly, and $1 million in the aggregate.

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The deadline for demonstrating financial responsibility is no later than October, 1990.[4]

Generally speaking, the insurance marketplace has not responded to the needs of schools in this area and continues to exclude all pollution situations through the use of the "absolute pollution exclusion." There are indications, however, that some excess and surplus lines carriers may have products available in the near future, providing limited coverage for storage tanks pending their certification by an outside consultant which states their compliance to current regulations.

Some states have established programs to pay for cleanup costs resulting from leaking underground storage tanks (UST's). These state funds can often be used by owners and operators of UST's to demonstrate financial responsibility required by the federal regulations. In most states, however, funds will only pay part of the cost of clean up, and in a few states, these funds will pay toward third party damages resulting from leaking tanks.[5]

Pennsylvania recently adopted Act 32 which establishes an Underground Storage Tank Indemnification Board and Fund. The fund will be responsible for satisfying the financial requirements established by the Federal Guidelines, subject to certain deductibles. All tank owners and operators in the Commonwealth will be required to participate in the operation of this fund.

The act establishes a $75,000 deductible per tank per occurrence for corrective action and a $150,000 deductible per tank per occurrence for claims due to bodily injury, property damage or both. The board will be allowed to adjust the deductibles in the future based on the experience of the fund, however, the act requires the deductible for corrective action may not be less than $50,000, nor less than $100,000 for third party liability.[6]

These deductibles will need to be satisfied by either setting specific reserves in the district budget for the tank problem or by purchasing insurance to cover them. With the state fund available to offset the large expense, insurers may be willing to offer a product which will address the deductibles. Districts need to determine if a state fund is available to help with their situation and then talk with their insurance carrier about possible coverage.

In addition to the insurance and state fund alternatives to this problem, surety bonds and letters of credit are acceptable means of providing proof of financial responsibility.[7]

ERRORS AND OMISSIONS COVERAGE

Several new players have entered the errors and omissions insurance marketplace within the last six months. While this will certainly create healthy competition for school board business, it also creates the need to carefully evaluate the various types of coverages offered by the carriers. This section is devoted to a discussion of some of the important coverage areas to which school boards and school board attorneys should give special attention.

Prior Acts Coverage

All errors and omissions policies in the marketplace are currently written on a "claims made" basis. Generally speaking, this means that any claim made during the policy period and after the retroactive date (if there is one) will be covered. The insuring agreement, however, will describe by its language which prior acts will be covered, if any. It is especially important to note whether or not prior acts coverage is available when changing from one carrier to another to assure continuity of coverage.

An insuring agreement covering only those acts occurring during the policy period would read as follows:

> To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages resulting from any claim or claims first made against the Insured and reported to the Company during the Policy Period....for any Wrongful Act...of the Insured .....if such Wrong Act first occurs during the Policy Period and in the performance of duties for the School District .....[8]

This type of statement would not provide any prior acts coverage; however, the company using this statement usually provides the opportunity to purchase prior acts coverage through a special endorsement at an additional premium charge.

An insuring agreement covering full prior acts would read as follows:

> "The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages as a result of claims first made during the period of this policy against the Insured by reason of Wrong Act(s) rendered in the discharge of the Educational Entity duties."[9]

As you will note, this language provides that the claim must be made during the policy period; however, there is no reference to when the act occurs. Insurance carriers providing this type of coverage consider this provision when developing the overall charge for the policy, and therefore, it should not be viewed as coverage provided without cost.

Cross-Claims and Counter-Claims

The National Union Policy, endorsed by NSBA and many state associations, excludes cross-claims and counter-claims from its policy.[10] This exclusion becomes important when you consider a scenario, for example, where the superintendent and school board have been sued by a former principal who was fired. This suit would be considered the "original claim" and would be covered by the policy. To help the board's position in this situation, the board decides to counter-claim against the former principal by filing suit against him. If the policy provided counter-claim coverage, the policy would provide defense for the principal in the suit brought against him by the board.

It has been the position of most boards involved in this type of suit that the policy should provide defense when the board is sued and not provide defense for those individuals sued by the board. It would seem difficult to justify to the taxpayers why the board has sued someone whose defense costs would be paid by the board's policy.

Non-Monetary Damages

Most insurance carriers exclude coverage for claims which have no monetary damages or seek injunctive relief.[11] This exclusion seems appropriate since the school district, and not the insurance carriers', is required to perform in a particular manner rather than expend funds. The insurance carrier should, however, be willing to provide defense for such claims.

It is also important to note whether the defense cost provided for such a claim will be a reduction in the limit of liability or will be in addition to the limit of liability. In this regard, some carriers' standard coverage reduces the limit of liability by the amount of defense costs provided for this type of claim. The School Leaders policy language provides for a reduction in the limit of liability for defense costs but is amended by an endorsement stating that defense costs will not reduce the limit of liability. [12]

This type of coverage can be important in claims dealing with the removal of books from the library, whether or not appropriate special education programs are in place or whether or not certain administrative procedures are in place.

Strikes, Riots or Civil Commotion

Most errors and omissions policies exclude coverage for incidents related to strikes or riots; however, the NSBA-endorsed School Leaders program does provide this important protection. As you are aware, the phenomenon of a strike is no stranger to public school operations. In some cases, strikes have been accompanied by riots. While there have only been a few claims arising out of these acts, it is conceivable that these acts will continue to occur in relation to public school operations and should therefore be covered.

It is important to remember that claims arising out of bodily injury or property damage, regardless of the cause, would not be covered by the errors and omissions policy. A claim seeking injunctive relief of a strike, however, would be covered under this type of provision.

Failure to Maintain Insurance or Employee Benefit Plan

While this has not been a troublesome area for school districts to date, it is an area which could produce a substantial claim. An employee suffering from a catastrophic illness not covered by the health care program or a taxpayer believing the district inadequately insured a building which burned, are two examples of claims which could arise under this area of coverage.

Most errors and omissions policies do not provide coverage for this type of incident. The exclusion is simply stated, "Based upon or arising out of any activity by the Insured concerning any employee benefit plan or self-insurance fund." The other important exclusion states, "Based upon or attributable to any failure or omission of the insured to effect or maintain insurance of any kind."

The School Leaders policy, while excluding these coverages in the body of the policy, does add an endorsement to the policy which provides for the defense of claims or suits for failure to maintain insurance. The endorsement does not provide for damages, however, which would be left to the district to satisfy. [13]

Inverse Condemnation, Eminent Domain, Etc.

The power of a school district to take private property for public use could give rise to an errors and omissions claim. If a claim of this nature occurred, many policies in the marketplace would not respond because they specifically exclude legal actions for taking property through eminent domain, dedication by adverse use, adverse possession or inverse condemnation.

The School Leaders policy does not exclude coverage for such a problem and since this is not an unusual occurrence in school operations should be insured.

Civil Rights

A major consideration when purchasing errors and omissions insurance should be the willingness of the insurer to respond to civil rights problems. This area of concern ranks high on the list of most frequent claims.

One of the policies in the marketplace states that it will not provide protection "for failure to integrate or desegregate the student enrollment, or failure to integrate or desegregate participation in any education entity...on the basis of race, sex, ethnic background or national origin...in violation of a court order." The exclusion is not triggered if the alleged act is not in violation of a court order. In such circumstances defense would be provided.

Another carrier has an exclusion which provides that the company will not pay damages related to such a claim, but would provide up to a $50,000 aggregate limit of defense. There are, however, two exceptions to this exclusion. The first exception would be in a situation where the claim is brought by another governmental entity. In this case the carrier would not provide defense at all. In the other exception, defense costs in addition to the limits would be paid if the action is brought by an employee.

As you can see, individual insurance carriers approach the topic differently, requiring the district to carefully consider the advantages and disadvantages of each type of coverage available. Most times these coverages must be evaluated on the basis of the problems likely to surface in a particular school district. Because of this, it is important that the school attorney participate in the purchasing decisions related to errors and omissions insurance.

AHERA Concerns

Many errors and omissions policies exclude any claim arising out of pollution. With the passage of the Asbestos Hazards Emergency Response Act, school districts all across the nation have asked the question, "Are we covered?"

Generally speaking, the answer from the insurance industry has been, "No!"

That is not necessarily the answer for those districts insured by the School Leaders Errors and Omissions program. While it is true the policy excludes all claims for bodily injury or failure to company with EPA guidelines, there are at least two types of claims which would be covered. [14]

In one instance, a group of district taxpayers is of the opinion that the district is not moving fast enough to comply with AHERA or that the district has not taken the steps necessary to comply with the law and bring suit to force the district into compliance. Assuming there are no allegations of sickness or death, the School Leaders policy would defend the claim. However, in the event the district loses, the policy would not cover any costs incurred by the district to speed up or to comply eventually with the law.

The other situation would come into play when the district's AHERA administrator has set in motion a plan to correct the asbestos problem in the district's schools; however, at the

conclusion of the abatement process, the EPA comes back and says the process must be done again. The AHERA administrator starts another abatement process and, during that process, is sued, along with the board, by some district taxpayers seeking damages for the amount of money spent on the first abatement program.

In this scenario, the School Leaders policy would respond to defend the district, the board and the administrator. In the event an award of damages was made by the court, the School Leaders policy would cover that also, subject to the policy exclusion.

The School Leaders policy does provide some limited coverage for claims arising out of asbestos. It may be the only policy which does, because it does not contain the typical "pollution" exclusion which is found in most insurance policies.

Back Salary

Most policies exclude back wages, overtime or similar claims, even if designated as liquidated damages, under federal, state or local statutes, or claims arising from collective bargaining agreements. It is important to determine, however, if the carrier will defend claims where back or future salary is involved. This issue becomes extremely important when you consider that over 55% of the claims filed against errors and omissions policies are brought by employees or former employees seeking damages which include a salary component.

At a minimum, it is important the insurer defend the claim.

Incurring Costs and Settling Claims

Many school districts have found themselves in a very awkward position with their insurance carrier when they make a commitment to a claimant without the prior approval and consent of the insurance carrier. Most policies have a provision prohibiting the insured school district from voluntarily making any payment, assuming any obligation or incurring any expense at its own cost. Doing so may negate coverage provided by the policy.

Most policy language provides that the company procure the written consent of the insured school district to settle a claim. In the event the district refuses to consent to the settlement recommended by the company, the insured becomes liable for any amount in excess of that recommended by the insurance company. [15] In other words, the insurance company's liability is limited to the amount for which the claim could have been settled plus the costs and expenses incurred with the company's consent up to the date of such refusal.

DESIGNATION OF COUNSEL

For the last several years, many districts have been concerned about their inability to select their own attorney in errors and omissions insurance cases. As the scope of coverage under this policy has expanded to include employment issues, constitutional questions, and more specialized educational issues, it has become evident that specialized knowledge in handling these cases is important.

National Union, perhaps the largest insurer of school board errors and omissions in the nation, has recently agreed to the establishment of a panel of school law specialists which will be used on School Leaders claims.[16] Several state panels will be implemented on a trial basis to determine the viability of such an approach.

When considering designation of counsel, however, it is important to remember that most errors and omissions policies are written on a "pay on behalf of" basis rather than as an indemnification agreement.[17] A policy written on an indemnification basis will reimburse the insured for claims and claims costs already paid. When the policy is written on a "pay on behalf of" basis, the insured has agreed to allow the insurance company to defend the claim and pay damages as it deems appropriate.

Under an indemnification policy the insured has the responsibility for selecting its own legal counsel, without approval from the insurer, and handling the cases to conclusion. When the claim is ready for payment, however, there may be a dispute between the insured and the carrier as to which costs will be reimbursed and whether or not all of the damages will be paid. Because of these problems, the indemnity agreement has not generally been available in the marketplace. Insurance carriers and insured alike want to understand their obligations before the claim is filed and not when the claim is completed.

Even though an indemnity agreement is not used for most errors and omissions policies, and therefore, the counsel will be appointed by the carrier, the insured school district should be confident the attorney appointed has sufficient expertise in school law to deal properly with the issues. Most insurance carriers are constantly evaluating proposals received from legal firms to determine if they are able to add them to their list of approved counsel. As stated earlier, the NSBA-endorsed carrier has agreed to put into place a panel of school law specialists. This concept will be implemented in several states to determine the effectiveness of such a panel. In Pennsylvania, for example, the firm of Clerkner and Fearen, a school law specialist among other areas, has been added to the existing panel and will be considered lead counsel for School Leaders claims. An evaluation at a later date will determine how effective this change has been.

Even though many positive changes are taking place regarding the designation of counsel with a variety of insurers, it is important to remember that:

- The insurance carrier, under the type of policy currently being offered in the marketplace, retains its right to appoint counsel without the district's consent;
- Carriers who claim they use local school attorneys usually qualify that by saying the attorneys must be "approved" by the company (will do business the company way) and point out that it may not be appropriate to use the attorney whose legal advice may have caused the claim;
- The attorney selected by any carrier has its first obligation to the insurance carrier, and unfortunately, not the district.
- The insurance carrier has no legal responsibility to protect the credibility of district policy or staff; however, it should promote such credibility when possible.

Until insurance carriers are willing to offer indemnity agreements for school district errors and omissions problems, it is unlikely this situation will be resolved to all the parties, satisfaction. In the meantime, school districts must continue to express their concern to all insurers involved in this market and attorneys must be assigned who have expertise in school law and who will serve the interest of both the school district and the carrier.

END NOTES

(1) *Hurricane Hugo Losses Higher Than Expected,* National Underwriter, Jan. 15, 1990, at 3.

(2) *Many Insurers See Price Rises Starting,* National Underwriter, Jan. 8, 1990, at 3.

(3) *Brokers See Stable Rates Rather Than Big Increases,* Business Insurance, Jan. 1, 1990; at 1.

(4) United States Environmental Protection Agency, *Dollars and Sense,* Dec. 1988, at 7.

(5) Act 32 of 1989, Storage Tank and Spill Prevention Act.

(6) *Dollars and Sense,* at 7.

(7) *Dollars and Sense,* at 6.

(8) National Union Insurance Company, School Leaders Errors and Omissions Policy, Section 1.

(9) Markel Services Presentation to the Pennsylvania School Boards Association Insurance Trust, Jan. 19, 1990,(discussing Insuring Agreement).

(10) National Union, exclusion i.

(11) Some carriers will defend claims for non-monetary damages when combined with a claim for money damages.

(12) When analyzing an insurance policy it is important to read all the exclusions and endorsements carefully. What is given or taken away in one section may be returned in another. An assumption about coverage cannot be made until the entire policy has been analyzed.

(13) National Union, endorsement 41265 (Oct. 1984).

(14) Presentation by Jan Pacey, Forrest T. Jones to PSBA Insurance Trust (Jan. 19, 1990).

(15) Markel Services, Section 11, Settlement.

(16) Presentation by Pacey, *supra*, at n.14.

(17) It cannot be overemphasized that using the "pay on behalf of" language gives the insurance carrier the right to select the attorney and settle the case at the lowest possible cost to the carrier.

RECENT SUPREME COURT RULINGS AND CONGRESS' RESPONSE

Gwendolyn H. Gregory
National School Boards Association
Alexandria, Virginia

SIGNIFICANT CASES FROM LATE 1988 TERM

Section 1981 and Section 1983

Jett v. Dallas Independent School District[1]

See discussion below under Civil Rights Act of 1990.

City of Canton, Ohio v. Harris[2]

This case raises the issue of whether a municipality can be held liable under section 1983 for its failure to properly train its employees. The Court answered "yes" but the standards for determining liability are not clear.

City of Canton, Ohio v. Harris, was a suit against a police department in which the plaintiff claimed that after she was arrested she became ill and passed out. The shift commander merely looked her over and sent her to a cell. Later her relatives discovered her condition and had her removed to a hospital. She claimed that since shift commanders are authorized in their sole discretion to determine whether arrested persons are in need of medical attention, the city and the department should have made certain that the commanders received sufficient training to make that determination.

The Court upheld the city's policy and held that even if an employee unconstitutionally applied the city's policy that would not raise a constitutional issue against the city. However the Court agreed with the plaintiff that "if a concededly valid policy is unconstitutionally applied by a municipal employee, the city is liable if the employee has not been adequately trained and the constitutional wrong has been caused by that failure to train."

As to the standard for determining liability for failure to train, the Court held that liability exists only if "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." That rule follows *Pembaur v. Cincinnati,*[3] which held that "municipal liability under section 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives" by the policy makers.

In a separate opinion Justice O'Connor, joined by Justices Scalia and Kennedy, agreed as to the substantive part of the majority decision but dissented from the judgment remanding the case because "I believe, as the majority strongly hints . . . that respondent has not and could not satisfy the fault and causation requirements we adopt today."

A strong argument could be made that this case does not apply to schools. Before the section 1983 issue arises at all, it must be shown that the employee violated the Constitution or some other federal law. In order to do that there must be a showing that some procedural or substantive right was abridged. In this case that would be a substantive duty to protect from injury. The duty to protect and the "deliberate indifference" standard traditionally have arisen in the context of cases involving prisoners and committed mental patients. Such a duty has not been established for schools, although some lower court decisions have expanded the standard beyond the context of incarceration. As noted in

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the discussion on *DeShaney v. Winnebago,*[4] the Supreme Court has stated in earlier cases that because of the openness of the schools, they are not subject to the same standard as the police.

Age Discrimination in Employment Act

Public Employees Retirement System v. Betts[5]

The Supreme Court ruled that all *bona fide* employee benefit plans are exempt from the prohibitions of the Age Discrimination in Employment Act unless the plan is a subterfuge for discrimination in the non-fringe benefit aspects of the employment relationship. In this case, the plaintiff had challenged a provision of the state retirement pension plan which established a floor of 30% of the retiree's final average salary for employees who retired on disability but provided no similar minimum percentage for age and service pension payments. Employees over 60 years of age were ineligible for disability retirement regardless of their medical condition.

In an opinion interpreting the meaning of "subterfuge," the Court adhered to an earlier decision in *United Air Lines, Inc. v. McMann,*[6] which held that "subterfuge" should be given its ordinary meaning as "a scheme, plan, stratagem, or artifice of evasion," and which expressly "reject[ed] any . . . *per se* rule requiring an employer to show an economic or business purpose in order to satisfy the subterfuge language of the Act."

In refusing to accept that only a cost justification exempts those plans prescribing a lower benefit for older employees on account of age from ADEA coverage, the Court explained that nothing in the Act's language supports such an interpretation of "subterfuge." The Court viewed it as stretching the statutory language too far to suggest that Congress' listing of certain types of plans that might fall into the exempt category of "employee benefit plans" is an exclusive listing meant to indicate that only those plans with a cost justification for age-based reduction in benefits qualify for the exemption.

The Court also did not accept the agency interpretation of the statutory language. The Court found that the Department of Labor's cost justification requirement codified at 29 C.F.R. § 1625.10(d) (1988) is an invalid definition of the "subterfuge" language. The Court said that the cost justification rule was originally intended as a nonexclusive safe harbor for employers to use in determining whether they could be certain of qualifying for the exemption and not as "the exclusive means of escaping classification as a subterfuge."

The Court placed the burden on the employee to prove that the challenged plan provision is actually a subterfuge for the purpose of discriminating in some non-fringe benefit aspect of the employment relation.

Justice Marshall and Brennan dissented, asserting that the majority's decision "virtually immunizes all employee benefit programs from liability under the . . . ADEA. Henceforth, liability will not attach . . . even if an employer is unable to put forth any justification for denying older workers the benefits younger ones receive. . . ."

First Amendment - Establishment of Religion Clause

Allegheny County v. Greater Pittsburgh ACLU[7]

In a split decision in the case of *Allegheny County v. Greater Pittsburgh ACLU,* the U.S. Supreme Court has ruled on the constitutionality of two Christmas holiday displays in Pittsburgh, Pennsylvania. A nativity scene in the county courthouse was held to violate the Constitution's establishment of religion clause, but a display outside the city-county building of a 45-foot decorated Christmas tree, an 18-foot Chanukah menorah and a "salute to liberty" message from the mayor was upheld.

Justice Blackmun wrote the opinion for the Court holding that the display had the primary effect of endorsing Christianity. This was determined because of the prominent placement of the nativity scene, the inclusion in the display of a plaque stating that it was donated by a religious society and a banner proclaiming "Gloria in Excelsis Deo!" in addition to the lack of any other items in the display which would dilute its religious message.

Conversely, the Court held that the effect of the other display on a "reasonable observer" is merely to acknowledge the cultural diversity of this country and recognize that "the winter holiday season is celebrated in diverse ways by our citizens."

Justices Brennan in a dissent in which Marshall and Stevens joined, stated his belief that both displays are unconstitutional. He

opined that although Chanukah has some secular background it is not a secular holiday and "the menorrah is indisputably a religious symbol, used ritually in a celebration that has deep religious significance. That . . . is all that need be said."

Justice Kennedy, Chief Justice Rehnquist, Justices White and Scalia would hold that both displays are constitutional, because they believe a religious display does not violate the Constitution unless it has a coercive effect. Justice O'Connor was the only justice who agreed with Blackmun's conclusion on both issues.

All of the opinions discussed at length the Court's 1984 opinion in *Lynch v. Donnelly*.[8] That case upheld a Christmas display in Pawtucket, Rhode Island which included a nativity scene. Justice Blackmun, ignoring the majority opinion in that case, adopted in *Allegheny County,* Justice O'Connor's concurrence from *Lynch* to the effect that the "crucial" question is whether the government's action has the effect of "communicating a message of government endorsement or disapproval of religion." Because of his emphasis on the need to examine the particular facts of each case, Justice Blackmun's opinion includes pictures of the two displays and a good deal of discussion about the differences between the displays, including a description of the nature and location of each object in the display and the effect of its inclusion on the viewer. This discussion prompted Justice Brennan to say in his dissent, "I shudder to think that the only 'reasonable observer' is one who shares the particular views on perspective, spacing, and accent expressed in Justice Blackmun's opinion, thus making analysis under the Establishment Clause look more like an exam in Art 101 than an inquiry into constitutional law."

Justice Kennedy on the other hand, writing for the dissent on this issue found the comparison of the other objects in the *Lynch v. Donnelly,* display (a talking wishing well and a Santa Claus, among other things) disturbing because he believes the case was not based on the fact that "secular" objects were included in the display. He believes that the decision in *Lynch* would have been the same even had the display included only the nativity scene. He faulted Justice Blackmun for adopting the concurring opinion in *Lynch*. "Since the majority does not state its intent to overrule *Lynch,* I find its refusal to apply the reasoning of that decision quite confusing."

Although Justice O'Connor agreed with Justice Blackmun's analysis as to the standards for determining whether a particular public religious display violates the first amendment, she disagreed with his characterization of Chanukah as a "secular holiday." She would hold that the state can establish religion by endorsing a minority religion through the display of a religious symbol like a menorrah. The inquiry, under Justice O'Connor's analysis, is whether by displaying the symbol the state is endorsing Judaism or merely indicating "that the city intended to convey its own distinctive message of pluralism and freedom."

It is unclear how the Court would rule in a case involving religious displays in public schools. In a footnote, Justice Blackmun noted that the combined display in a public building of a Christmas tree and a menorah is not necessarily always constitutional. As an example, he pointed out that the "special sensitivity in the public-school context" may require additional constitutional considerations. Perhaps the rule in the school context is to determine the effect of the display on a "reasonable *student* observer." Nevertheless, school districts which display religious symbols during the holidays would be well advised also to include educational programs explaining the displays with emphasis on this country's cultural and religious diversity.

First Amendment - Free Exercise of Religion

Frazee v. Illinois Department of Employment Security[9]

In the latest of a series of cases involving denial of unemployment benefits to persons who refuse work for religious reasons, the Supreme Court has ruled that the religious belief need not stem from a tenet of an established religious sect. In this case, *Frazee v. Illinois Department of Employment Security,* the plaintiff was an employee of Kelly Services. He refused employment that would require him to work on Sunday, claiming that he is a Christian and takes literally the Bible's proscription against work on Sunday.

Although admitting that Frazee's religious beliefs are sincerly held, the Illinois state courts distinguished earlier Supreme Court decisions on the basis that in this case the plaintiff admitted that he belonged to no established religious sect. The High Court ruled unanimously that if

the belief stems from sincere religious conviction it is irrelevant whether the person subscribing to the belief is a member of an organized religious sect.

The Court acknowledged that its ruling might make more difficult the determination of sincerity of belief and distinguishing between strongly-held secular and religious belief but in absence of "state interests sufficiently compelling to override a legitimate claim to the free exercise of religion," the plaintiff's first amendment right must be upheld.

Eleventh Amendment - P.L. 94-142

Dellmuth v. Muth[10]

States cannot be sued for damages under the Education of the Handicapped Children under a decision by the Supreme Court in *Dellmuth v. Muth.* Parents sought reimbursement for their handicapped child's private school tuition and attorneys' fees. The parents placed their child in a private school, after disagreeing with the I.E.P. developed for their child by the school district. They also challenged the state's administrative procedures as in compliance with the Act. The lower courts held that the district's proposed I.E.P. was appropriate but that Pennsylvania's administrative procedure scheme did not comply with the Act. Because of the delay in resolving the matter through the state's defective procedures and because the appropriate I.E.P. did not come into existence until a year after the parents original objections to the plan were filed, the lower courts ruled that the school district and the state are jointly liable for tuition one year and attorneys' fees.

Although acknowledging the Act's frequent reference to the states and the "delineation of the States' important role in securing an appropriate education for handicapped children," the Court held that Congress' intent to abrogate the eleventh amendment must be "both unequivocal and textual." The language of the Act "does not evince an unmistakably clear intention to abrogate . . . ." Suits for damages cannot be maintained in federal court under the Act against the State. It should be noted, however, that the eleventh amendment would not act as a bar to an injunction against the State, *e.g.*, to force it to change its administrative procedures or enroll a child in a state school. Query: Is an order directing the state to enroll a child in a private school and pay the tuition an impermissible damage award or a permissible injunction?

The Act provides for appeals to either federal or state courts. Since the eleventh amendment does not apply to suits in state courts, perhaps a suit against the State could be maintained in state court. However, the Supreme Court's decision this term in *Will v. Michigan Department of State Police,*[11] raises questions as to whether the Court would uphold state court suits against the State under the Act, in absence of consent by the State.

Where does this case leave school districts? The case does not affect school district substantive obligations under the Act. The only effect relates to the contribution of the state to the payment of a damages award. Districts may have difficulty seeking contribution from the state for damages where liability springs from a substantive violation, such as the failure to provide a free appropriate public education. But where, as here, the violation results from school district compliance with unlawful state requirements, the district should consider joining the state in the action brought against it by parents, seeking indemnification for damage awards resulting from the district's compliance with state mandates.

1989 TERM OF THE SUPREME COURT

Equal Access

Board of Education of the Westside Community Schools (Dist. 66) v. Mergens.[12]

This case was brought by several student members of a religious club, "Christian Bible Club," which was refused permission to meet after school at the same time as other student clubs. The Equal Access Act requires secondary schools that operate a "limited public forum" to allow all student initiated clubs to meet on the same basis. The school district contended that only clubs that are directly related to the educational mission of the school are allowed to meet and, therefore, the school did not operate a "limited open forum" that would subject it to the requirements of the Act.

The trial court agreed with the school district and entered judgment for the district. The court of appeals reversed holding that if the school allows just one non curriculum-related club to meet, it is brought under the Act. The

court held that several clubs allowed to meet are not related to the curriculum, among them the chess club, Subsurfers (scuba diving), Interact and Zonta (both connected to Rotary International). The court refused to accept the school district's contention that the chess club fosters critical thinking and logic, Zonta and Interact are related to the goals of sociology and psychology and Subsurfers relates to the goals of physical education.

In the Supreme Court the district raises two issues: first, a constitutional issue whether the Equal Access Act establishes religion by requiring schools to officially sponsor religious clubs and second, whether for the purposes of the Equal Access Act, certain clubs are necessarily non curriculum-related, notwithstanding that the school officials have denominated them as curriculum-related.

The Court heard oral arguments in the case on January 9, 1990. The questioning centered on the issue of whether the clubs allowed to meet on school premises during the school day were non curriculum-related. Although the Respondent's attorney argued the constitutional question, the justices did not seem to be as interested in that issue as the one relating to whether the school operated a "limited open forum."

Desegregation "Unitary Status" Cases

DeKalb County, Georgia

On October 11, 1989, the Eleventh Circuit Court of Appeals ruled in the case of *Pitts v. Freeman,*[13] that until the DeKalb County, Georgia school district has been in compliance with *all* six, so-called *"Green* factors" for at least three years, a district court errs in declaring that the district has achieved "unitary status," thereby removing it from court oversight.

The *"Green* factors" were established by the U.S. Supreme Court in the case of *Green v. County School Board.*[14] They include student assignment, faculty, staff, transportation, extracurricular activities, and facilities.

The school district unsuccessfully argued that because the district had completely desegregated the system in 1969 by closing all *de jure* black schools, it could not be held responsible for later resegregation caused by segregated housing patterns. Rejecting the First Circuit's ruling in *Morgan v. Nucci,*[15] permitting school systems to achieve unitary status incrementally, the Eleventh Circuit ruled that because of DeKalb's failure to establish a desegregated faculty, it could not be declared unitary as to student assignment and must be held responsible for resegregation. The district was directed to consider "pairing and clustering of schools, drastic gerrymandering of school zones, and grade reorganization . . . and must consider busing — regardless of whether the plaintiffs support such a proposal."

The school district has filed a *petition* for *certiorari* in the U.S. Supreme Court and NSBA has filed an *amicus curiae* brief in support of High Court review.

Oklahoma City, Oklahoma

In the Oklahoma City case, the plaintiffs in *Dowell v. Board of Education of the Oklahoma City Public Schools, Independent District No. 89, No. 88-1062*[16] are not contesting that the district achieved "unitary" status. However, they challenge the school district's reversion to a "neighborhood" student assignment plan resulting in resegregation. The Tenth Circuit Court of Appeals held that the original injunction under which the district desegregated cannot be dissolved without proof of a "substantial change in the circumstances which led to issuance of that decree." The court also held that the district's proposed changes should be examined to ensure that the plan maintains "the continuing prospective effect of the decree," that is, does the plan have the effect of resegregating the district. The opinion noted that the Fifth and Fourth Circuits have rendered contrary decisions. The dissent argued that the effect of the majority decision is to place desegregated school districts under court jurisdiction "in perpetuity."

The school district has filed a *petition* for *certiorari* and NSBA has filed a brief in support. Two years ago the High Court refused to review an earlier decision involving Oklahoma City and a decision raising similar issues involving the Norfolk, Virginia schools. The two decisions are in conflict in a number of respects.

School Board Immunity from Section 1983 Suits in State Courts

The U.S. Supreme Court has agreed to review a Florida state court holding that a school board is immune from liability in a section 1983 suit brought in a Florida court. The case report-

edly arises out of fourth amendment and procedural due process claims by a student against the Pinellas County, Florida school district. The Florida District Court of Appeal, Second District did not address the issue of federal preemption, holding that it is a matter of state law as to whether the state has waived its sovereign immunity. Since the State of Florida has not waived immunity in its own state courts except for traditional state tort actions, a section 1983 case against a school board cannot be prosecuted in Florida courts. *Howlett v. Rose.*[17] The Florida Supreme Court declined to review the decision.

Substantive Due Process—Duty to Protect

Last term the High Court ruled 6-3 in the case of *DeShaney v. Winnebago County Department of Social Services,* that generally there is no constitutional right to protection from private abuses, even where the state has created a mechanism of protection services. The case involved a boy who was beaten by his father, resulting in permanent brain damage. The suit brought by the child's non-custodial mother alleged that the local welfare agency in Wisconsin had received complaints from the father's second wife and from others reporting that the father was abusing the child. At one point the agency had attempted to remove the child from his father's care, but legal counsel had advised the agency that there was insufficient evidence of abuse. After learning of the final injuries inflicted by the father, the social worker assigned to monitor the case stated that she had expected to get a call some day saying that the boy had died.

Although conceding that the conduct of the social service officials would likely violate state tort laws, the Supreme Court refused to hold that the agency's inaction infringed any constitutional right. "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."

The Court distinguished cases relating to prisoners and committed mental patients who received inadequate medical care. In those cases, the state had placed the plaintiff in a situation where help is not available from any source other than the government. In those cases "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." The Court also noted in a footnote that the decision might have been different had the State placed the child in a foster home. "[W]e might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."

Justice Brennan, in a dissent joined by Justice Marshall and Justice Blackmun, argued that the majority's analysis that the Constitution imposes no affirmative duties preordains a holding that the failure to provide services does not violate the Constitution. The dissenters would begin from the opposite direction.

> "[A] State's [prior] actions can be decisive in assessing the constitutional significance of subsequent inaction." Where the state creates a duty to investigate reported instances of child abuse, as is the case under Wisconsin law, the courts may determine whether the state's failure to act was arbitrary or capricious. [I]naction can be every bit as abusive of power as action [and] oppression can result when a State undertakes a vital duty and then ignores it. Today's opinion construes the Due Process Clause to permit a State to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to try to prevent.

When this case was first decided, it was believed by many that the decision would be helpful to school districts in cases involving injuries to students by private parties (parents or others) or self-induced injury (in the case of a suicide) outside the school where district employees knew of the potential danger.

It has been argued that a "special relationship" exists between students and schools, thus warranting a rule that schools have an affirmative duty to protect students on school grounds from injuries caused by private parties. *DeShaney* may be helpful in such cases. The Court read narrowly the "special relationship" duty,

applying it only where the injured person is incarcerated by the state, either in a prison or a mental institution or, possibly, under *dictum* in *DeShaney,* in a foster home.

The question of whether the *DeShaney* precedent will apply to action, rather than inaction, of school employees is more difficult. Arguably, if the employee is acting in an individual capacity outside of school, there is no reason to treat that situation any differently than where the damage is done by a private party. One way of making the school district responsible would be through the "special relationship" theory, which should not apply if the damage did not occur on school grounds. Although the child would not have come in contact with the teacher but for the relationship in school, there does not appear to be a constitutional duty to protect a student in absence of a "special relationship."

Since the holding in *DeShaney* addresses injuries caused by "private" parties, the case is not as helpful with respect to injuries caused by employees on school grounds. Although the Court has held that simple negligence does not raise a constitutional violation, the question remains open as to whether a showing of gross negligence would result in a different ruling.

Later in the term, the Supreme Court vacated and remanded in light of *DeShaney v. Winnebago,* two school cases, *Stoneking v. Bradford Area School District,*[18] and *Smith v. Sowers.*[19] The Third Circuit had denied the summary judgment motion of a school district, high school principal, assistant principal and superintendent where the plaintiffs alleged sexual abuse of female students by a high school band director.

The court of appeals held in *Stoneking* that the student alleged violation of a clearly established constitutional right "to be free from sexual abuse by her school teachers that was clearly established by 1979, when defendants were put on notice of [the band director's] alleged abuse of a female student." The court held that the school officials had a "constitutional duty to investigate and take reasonable steps to protect the students."

A dissent pointed out that the majority cited no case "from which its 'constitutional duty to investigate' is 'readily apparent.' " The dissent acknowledged that a number of courts have found a "special relationship," giving rise to a duty to protect, in other contexts. It goes on to point out that "[n]either this court nor any other federal court of appeals has held, however, that a special relationship exists between a school administrator and students within his or her jurisdiction."

The Supreme Court reversed both cases and remanded them back to the court of appeals to reconsider its decisions in light of *DeShaney.*

In *Sowers* a female student in the Bradford Area School District, Pennsylvania alleged that she was sexually abused and harassed by a school district band director. There were no allegations, however, that any other school officials knew of the abuse or had any notice that the band director had abused any other students.

In *Stoneking* another female student in the Bradford Area School District alleged that she was sexually abused and harassed by the band director after the attack on Sowers had been brought to the attention of the principal. She also asserted that the director was guilty of similar acts with other female students in the school district. She alleged that some of the acts occurred in the band room at the high school and some in the home of the band director. Plaintiff alleged that several students complained to the principal of the school, who failed to take any action against the band director other than to keep a record of complaints and to order him not to have any "one-on-one contact" with female band members. The band director was ultimately prosecuted for various sex-related crimes and pled guilty.

On rehearing, the court of appeals held that the school principal and assistant principal are not immune from personal liability but the superintendent is immune. The court did not address the question of whether the school district is liable because of its failure to protect the student, saying "we prefer not to rest our decision again on an affirmative duty to protect such students in this situation because the uncertainty of the law in this respect may cause further delay." That, of course, was the issue in *DeShaney* and, presumably the issue that the Supreme Court intended the court of appeals to address at their rehearing.

The principal, assistant principal and superintendent filed a petition for *certiorari* in the Supreme Court. Because the court of appeals' second opinion did not address the issue of duty to protect, the school district was not a party to the petition for review. The Court denied the petition without comment. The case will now be tried to a jury but, unfortunately, the trial court

is likely to include a jury instruction on the question of duty to protect and special relationship, drawing an analogy between the schools and foster homes.

The issue of "special relationship" is fast becoming a way for plaintiffs' lawyers to avoid sovereign immunity laws, statutory restrictions on damage awards and other limitations on liability of public entities. In a recent case in New York, for example, a district court refused to dismiss an action brought under section 1983 against the Massapequa Public Schools, alleging that the district breached its duty to protect a student from repeated attacks by other students. The court distinguished *DeShaney,* holding that a child in school is comparable to a child in a foster home setting. The court stated that the allegations in the plaintiff's complaint raise more than a negligence claim. His allegation of seventeen separate incidents without the district taking preventive action "may be considered to rise to the level of deliberate indifference to an affirmative duty." *Pagano v. Massapequa Public Schools.*[20]

Another case ruled against the plaintiff on a deliberate indifference claim. In *D.T. v. Independent School District No. 18 of Pawnee County, Oklahoma,*[21] the Tenth Circuit Court of Appeals ruled that the school district cannot be held liable under section 1983 for the actions of a school teacher/coach, Stephen Lee Epps, who sexually molested three fifth grade boys during the summer break.

Epps molested the boys at his home after a candy sale to support a summer sports program. The sports program had nothing to do with the school district and there was no allegation that school officials even knew about it. The trial court allowed the case to go to the jury, which awarded the boys a total of $134,000 in damages. The court of appeals held that since the sports program was not school related, Epps could not be said to be acting "under color of state law." Even if school district officials were reckless in failing to investigate allegations about Epps concerning prior sex offenses, that failure was not the "moving force behind the alleged constitutionally protected rights . . . ."

The court distinguished the case of *Stoneking v. Bradford Area School Dist.,*[18] on the basis that the alleged acts in *Stoneking* occured on school grounds.

The plaintiff argued that the teacher is an "authority figure" and because the district clothed him with that authority he can be said to be acting "under color of state law." The court disagreed, holding that there was no "nexus" between the summertime sports event and the duties and obligations owed by the coach to the district. The court cited *City of Canton v. Harris,* for the proposition that inadequate training can be the basis of liability where there is a connection between the injury and the inadequate training. This statement is disturbing because the court seems to be saying that there is a substantive constitutional right to be free from bodily injury in a school setting. The Supreme Court has not so ruled.

In 1977 the Court noted in the case of *Ingraham v. Wright,*[22] that the openness of the schools distinguishes that environment from the prison environment. Thus, the Court held that imposition of corporal punishment in the schools does not violate the eighth amendment prohibition of cruel and unusual punishment. The Court ruled that the student had a liberty interest in freedom from bodily injury that implicates procedural due process but the Court did not reach the question of whether excessive corporal punishment would raise a substantive due process issue. A number of lower courts have misread *Ingraham* to say that students have a substantive due process right to be free from bodily injury.

CONGRESSIONAL EFFORTS TO OVERTURN 1988 TERM SUPREME COURT DECISIONS: CIVIL RIGHTS ACT OF 1990

There is presently pending before Congress a bill to amend the Civil Rights Act of 1964, purportedly to overturn several recent Supreme Court decisions. S.2104, 101 Cong., 2d Sess. (Feb. 7, 1990). But the bill, introduced by Senator Kennedy for himself and 34 other senators — not an insignificant number — goes much further than merely reversing the decisions. It includes broad new substantive provisions that could seriously impede the discretion of employers to develop their own hiring and promotion standards. A copy of the bill is available through NSBA upon request.

Set forth below is a discussion of each of the cases that the proposed legislation would overturn and an analysis of the language to accomplish that purpose as well as the provisions in the bill that do not address particular Supreme Court decisions.

Summary of Provisions

Title VII Amendments

- The plaintiff need only show that an unlawful consideration was "a motivating factor" for an employment practice, regardless of whether there were other factors.

- The employer must then "establish...that it would have taken the same action" anyway.

- The plaintiff only has the burden of demonstrating the existence of "disparate impact" in one or more employment practices or in the employer's "overall employment process." Plaintiff need not specify the practice(s).

- The burden of persuasion shifts to employer to show that the practice is "essential to effective job performance."

- Litigated or consent decrees are not subject to challenge by anyone who had notice and a reasonable opportunity to object.

- Filing of charge dates under Title VII are amended.

- The Act prohibits the application of intentionally discriminatory seniority systems in collective bargaining agreements.

- The Act allows for the award of compensatory damages and trial by jury.

- The Act prohibits entry of a consent order that includes waiver of attorneys' fees unless both counsel attest that the waiver was not compelled as a condition of the settlement

Amendments to 42 U.S.C. Section 1981

- Amends Section 1981 to cover administration of the contract, not merely the making of it. Effectively amends section 1981 to cover public entities as well as private.

Price Waterhouse v. Hopkins[23]

In a confusing set of opinions, the Supreme Court ruled in *Price Waterhouse v. Hopkins* that where a plaintiff in a case brought under Title VII of the Civil Rights Act of 1964 shows that there is "substantial evidence" that an employment decision was based on discriminatory criteria, the burden of persuasion shifts to the employer to prove by "a preponderance of the evidence" that the decision would have been justified wholly on legitimate grounds. The Court held that the lower court erred in placing on the employer a burden to justify the decision by "clear and convincing evidence." The plurality opinion by Justice Brennan, with Justices Marshall, Blackmun and Stevens joining, states that this is not a case of "shifting burdens," because the employer's burden is "more appropriately deemed an affirmative defense."

The plaintiff claimed that her bid for partnership in the national accounting firm of Price Waterhouse was denied on sexually discriminatory grounds. She showed that firm partners described her as "macho," advised her to "take a course in charm school," and stated that some partners felt it was inappropriate for a "lady" to use foul language. She was told by the partner responsible for informing her of the partnership vote that her chances would be improved if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Even the partners supporting her agreed that her "inter-personal skills" were limited. But the evidence of her business acumen was conceded by her detractors, the company having landed a $25 million contract with the Department of State primarily due to her efforts.

Both Justices White and O'Connor refused to join in the plurality opinion by Justice Brennan (Justices Stevens and Blackmun concurring) because of the plurality's discussion of the substantive requirement of causation. Justice White parted company with the plurality because he believes the plurality would require the employer to submit objective evidence that the employer would have taken the same action absent the discriminatory motivation. Justice White would require the employer merely to "credibly testif[y] that the action would have been taken for legitimate reasons alone."

Justice O'Connor faults the plurality for apparently concluding that if the decisional process is "'tainted'" by awareness of sex or race in any way, the employer has violated the statute and Title VII thus *commands* that the burden shift to the employer . . . . " To the contrary, Justice O'Connor believes that the burden shifts to the employer only after the plaintiff shows

"direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision."

The dissenting opinion by Justice Kennedy, in which Chief Justice Rehnquist and Justice Scalia concurred, chastized the other members of the Court for departing from the Court's standard for assigning burden of proof set in *McDonnell Douglas Corp. v. Green,*[24] and *Texas Dept. of Community Affairs v. Burdine.*[25] The plurality distinguished those cases, stating that the new standard applies only where the plaintiff has met a burden of showing "substantial proof" of discriminatory action, whereas *McDonnell Douglas* and *Burdine* are "pretext" cases. Justice Kennedy argued that lower courts will find the new standard very difficult to apply because plaintiffs will inevitably produce "evidence of stray remarks in the workplace" and ask for a *Price Waterhouse* instruction.

Effect of the Bill

Improper Consideration as A Motivating Factor. The Act codifies the plurality in *Price Waterhouse* and goes even further. It provides that if the plaintiff "demonstrates" that a prohibited consideration such as sex was "a motivating factor" for any employment practice the employer shall be considered in violation of Title VII, "even though such practice was also motivated by other factors" (section 5(l)). In other words, the plaintiff does not have to show that the unlawful consideration was the primary consideration in the job action. The Act requires the plaintiff to show merely that an impermissible factor was *a* motivating factor which seems to require less of the plaintiff than the "substantial evidence" required by the plurality in *Price Waterhouse.* Under Justice Kennedy's example in *Price Waterhouse,* if there is proof of "stray remarks" by one member of a school board, that could be sufficient to establish an unlawful employment practice.

Under the Act, the employer, in order to prevail, must "establish that it would have taken the same action in the absence of any discrimination" (section 5 (b)). It is unclear why the Act uses the word "establish" instead of "demonstrates." The term "establish" is not defined so there may still be room to argue that the employer retains only the burden of production, not the burden of persuasion. That would be in line with Justice Brennan's plurality decision in *Price Waterhouse* where he states that the burden on the employer is in the nature of an affirmative defense.

Wards Cove Packing Company, Inc. v. Atonio[26]

Over the years there has been a continuing debate as to who has the burden of proof in a "disparate impact" case brought under Title VII. In a "disparate impact" case, intent to discriminate has not been shown but there is statistical or other evidence that a policy or practice of the employer has a disparate impact on minorities.

In the 1987-88 term the Supreme Court ruled in the case of *Watson v. Fort Worth Bank and Trust,*[27] that it is not necessary to prove intent to discriminate where the use of subjective employment criteria has an adverse impact on minorities. However, because Justice Kennedy was new to the Court and did not participate in the case there was no majority on the issue of who has the burden of proof, once the plaintiff has shown a disparate impact. Four justices believed that the employer must prove that the subjective criteria are job-related. Four would allow the employer to merely produce evidence of non-discriminatory reasons for the criteria, which the employee would then have to show are not business related. Then last term in the case of *Wards Cove Packing Company, Inc. v. Atonio,* Justice Kennedy sided with the justices placing on the employer only the duty of production of evidence of non-discriminatory reasons.

In this case, the plaintiffs alleged that the employer, an Alaskan salmon cannery, discriminated against nonwhite employees by placing whites in higher paying, mostly skilled jobs and nonwhites in lower paying, mostly unskilled jobs. They also allege discrimination in segregation of housing and eating facilities, application of nepotism and other discriminatory policies. The court of appeals agreed with the district court that there was insufficient evidence to show that the statistical disparity resulted from an intent to discriminate. But the court remanded the case for a finding on disparate impact, holding that the statistical disparity was sufficient to give rise to a *prima facie* case and the burden now shifted to the employer to prove that the disparity caused by its hiring and employment practices was the result of business necessity.

The Supreme Court reversed, holding that in the absence of a showing that practices of the employer deterred qualified nonwhite candidates from applying for noncannery positions, the mere existence of an imbalance in numbers between the two categories is insufficient to raise a *prima facie* case of discrimination. Justice White, writing for the five-justice majority, stated that "[m]easuring alleged discrimination in the selection of accountants, managers, boat captains, electricians, doctors, and engineers—and the long list of other 'skilled' noncannery positions found to exist by the District Court . . . by comparing the number of nonwhites occupying these jobs to the number of nonwhites filling cannery worker positions is nonsensical."

In order to make out a *prima facie* case, a plaintiff must show not only statistical disparity, but also "that it is the application of a specific or particular employment practice [such as nepotism] that has created the disparate impact under attack." Responding to anticipated complaints that records and other information relating to employment decisions are in the possession of the employer rather than the employee, Justice White noted that liberal civil discovery rules and the Uniform Guidelines on Employee Selection Procedures provide employees the tools to determine the cause of the racial disparity in the workforce.

Finally, as to the unanswered question in *Watson v. Ft. Worth Bank & Trust Bank & Trust Co.,* relating to the employer's burden after a *prima facie* case has been made, the Court held that the burden of *proof* does not shift. The employer's burden is to *produce* evidence of a business justification for the practice. The burden of proving the inadequacy of the justification remains on the plaintiff. Although acknowledging that it is appropriate for a plaintiff to come forward with alternatives that would result in less disparity, Justice White cautioned that "the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternate selection or hiring practice in response to a Title VII suit."

The four dissenters were "astonished" by Justice White's statement that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business . . . ." Justice Stevens, writing for the dissenters, cited *Dothard v Rowlinson,*[28] which held that prison administrators must rebut a *prima facie* case of discrimination by "showing that the height and weight requirements are . . . *essential* to effective job performance." (emphasis supplied).

Justice White responded to the dissent's concern that the canneries "bear an unsettling resemblance to aspects of a plantation economy" by arguing that the dissent's comments relate more to the allegations regarding segregated housing and eating facilities which, if true, may be discriminatory under Title VII regardless of whether a case is made that the hiring categories are discriminatory.

This case simplifies the employer's job of justifying employment practices where there is a racial disparity between one type of job and another. Under *Wards Cove* numbers alone will not prove a case of discrimination. But school districts are well advised to examine routinely their employment statistics and experiment with alternative hiring and promotion practices that might reduce racial disparities.

Effect of the Bill

Disparate Impact. The Act's provision designed to deal with *Wards Cove* turns the Act into the "Racial Balance Act of 1990." Under the Act once the plaintiff "demonstrates" that "an employment practice results in a "disparate impact," (section 4(k)(1)) the employer must "demonstrate" that the practice is required by "business necessity" (section 4(k)(2)). The Act is a double whammy because at the same time it gives the plaintiffs an easier burden than that under *Wards Cove,* but it imposes on the defendants a more difficult burden. Plaintiffs may prove disparate impact by demonstrating that "an employment practice" or "a group of employment practices" results in disparate impact (section 4(k)(1)). "Group of employment practices" is defined to include "a combination of employment practices or an overall employment process" (section 3(n)). Thus, if the employer's entire workforce does not meet a particular racial, ethnic or male/female percentage, the plaintiff has made the case of "disparate impact."

The Act does not define "disparate impact" so it is unclear which numbers should be compared. In *Wards Cove* the plaintiffs wanted to compare assembly line workers with accountants and other professionals. Analytically, the proof of "disparate impact" and proof of business necessity merge. Up to this point, the courts fairly uniformly have required plaintiffs in show-

ing "disparate impact" to compare "relevant" statistics. The Act does not appear to place that burden on the plaintiffs. In theory, the plaintiffs can opt to compare whatever numbers show disparity and then the burden is on the defendant to show that business necessity justifies the disparity. In cases like *Wards Cove* they might want to compare one set of positions with another. In another case they might want to compare the total workforce, or parts of the workforce, with national figures. The employer would still have the burden of demonstrating a business necessity for hiring locally or for adopting different employment standards for one set of employees than another. It would certainly seem appropriate to at least require plaintiffs to have the burden of proving that their comparisons are relevant.

And as if Congress has not already made its point, the Act provides that Plaintiffs are not required to demonstrate "which specific practice or practices" results in disparate impact.

Defendant's Burden of Persuasion. After plaintiffs have met this simple burden, the employer must demonstrate that the "practice is required by business necessity," (section 4(1)(B)) unless the employer can demonstrate that the practice does not contribute to the disparate impact. That might not be so bad except for the fact that the Act defines "business necessity" as "essential to effective job performance" (section 3(p)). And, the word "demonstrates" is defined as "burdens of production and persuasion" (section 3(m)). Thus, the employer must do more than come forward with evidence of business necessity. The employer actually has the burden of proving that the job criterion is essential to effectiveness on the job. Query: Is a college degree *essential* to effectiveness as a teacher?

The civil rights groups assert that *Wards Cove* in effect reversed *Griggs v. Duke Power*[29] and claim that the Act will put plaintiffs back in the position they were in before the decision. First, *Griggs* was not reversed by *Wards Cove* and second, the Act would go far beyond the holding in *Griggs*. The standard established in *Griggs* was "job relatedness." In that case the employer required a high school diploma for certain job categories in which there was a significant disproportion of whites. The employer could not relate the requirement to the job. The Supreme Court held that the employer must show that the requirements "are demonstrably a reasonable measure of job performance." At the same time the opinion quotes from the legislative history of Title VII to the effect that "[a]n employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance."

Nothing in *Griggs* would justify a standard as onerous as that established in the Act. "Job relatedness" is a non-discrimination requirement which prohibits employers from screening out minorities, even unintentionally, through the use of employment criteria that have nothing to do with the job for which the candidates are being selected. However, requiring proof that the criteria are "essential" is an *affirmative* requirement having no relationship to discrimination. Such a requirement ignores the fact that employers opt for one type of job selection criteria over another for a number of valid business reasons such as cost, ease of administration, time restraints and — perhaps the most important reason of all — because they want more than merely minimally qualified employees. It should not be the role of the Congress to decide which criteria should be adopted.

Martin v. Wilks[30]

White firefighters in Birmingham, Alabama brought a suit against the city and the Jefferson County Personnel Board accusing them of "reverse discrimination" in denying promotions to whites in favor of less qualified blacks. The city and the board defended their actions on the basis of a consent decree in an earlier Title VII suit in which the defendants agreed to goals for hiring and promoting black firefighters.

The district court ruled that the white firefighters were barred from collaterally attacking the consent decree. The court of appeals reversed holding that affected persons who were not a party to the original lawsuit may bring their own Title VII suit. The district court was directed to try the white employees' claims of unlawful discrimination, using Supreme Court standards for evaluating the legality of a voluntary affirmative action plan. In a 5-4 decision the Supreme Court affirmed.

The Court rejected the argument that requiring plaintiffs to join affected parties would deter civil rights litigation. The Court opined that plaintiffs are in a better position than po-

tential defendants to know what type of relief is being sought and who will be affected by the relief. Thus the burden is on the plaintiffs to join affected parties rather than on the affected parties to intervene.

Effect of the Bill

Consent Decrees and Third Parties. The Act overturns *Martin v. Wilks,* by providing (section 6(m)(1)) that a litigated or consent judgment resolving a claim of employment discrimination under either the Constitution or federal civil rights laws may not be challenged by a person who had notice and a reasonable opportunity to present objections or with respect to whom the court determined the interest was "adequately represented" or if the court determined that "reasonable efforts were made to provide notice to interested persons. The provision also states that any action, not precluded by the Act, challenging the practice that was the subject of the order shall be brought in the court "and if possible before the judge" that entered the order. This provision of the Act is in the interest of school districts who will want to be ensured that a consent decree disposes of the matter and is not open to collateral attack.

Lorance v. AT&T Technologies, Inc.[31]

The Supreme Court ruled in this case that under Title VII employees who seek to challenge as discriminatory a seniority system which is facially nondiscriminatory and which is nondiscriminatorily applied must file their complaint with the EEOC within 180 days (or 300 days, if proceedings are first instituted at a local or state agency) of the adoption of the system. *In Lorance v. AT & T Technologies,* the petitioners challenged a method of calculating seniority which was adopted in 1979 in a collective bargaining agreement provision which determined seniority on the basis of length of service in a position rather than on the basis of plantwide service. The petitioners, who were demoted in 1982 under the new method, claimed that the new seniority system had been adopted with the purpose and effect of protecting incumbents in the more highly paid "tester" positions—jobs traditionally dominated by men—from female employees who had greater plantwide seniority.

The Court ruled that the petitioners' claim was time barred since it "depends on proof of intentionally discriminatory adoption of the system," an event which "occurred outside the limitations period." The Court refused to adopt the theory that the seniority system constituted a continuing violation since the petitioners did not assert that the plan had been applied in a discriminatory fashion to them, but rather that it had been adopted with discriminatory intent. The Court said that in such instances, the proper focus is upon the alleged discriminatory act, not upon the time when the consequences of the act become most painful. The Court also rejected the notion that the discriminatory intent element should be regarded as an affirmative defense to be raised against claims of discriminatory impact with regard to seniority systems, thereby causing the statute of limitations to begin running from the time the impact is felt. The Court stated that a claim that a seniority system has a discriminatory impact must be accompanied by proof of discriminatory purpose; therefore, the limitations period will run from the date the system was adopted.

Justice Marshall, joined by Justices Brennan and Blackmun, dissented. Marshall charged that the majority decision produces a result never intended by Congress: "conferring absolute immunity on discriminatorily adopted seniority systems" that survive without challenge during the first 180 (or 300) days after adoption. Marshall said that each application of a discriminatory system should be viewed as a new violation of Title VII in order to ensure that victims of discrimination receive their day in court.

Effect of the Act

Discriminatory Seniority Provisions in Collective Bargaining Agreements. The Act (section (7)(b)) overturns this case by providing that where any seniority system or practice that was included in a collective bargaining agreement with the intent to discriminate "the application of such system or practice during the period that such collective bargaining agreement is in effect shall be an unlawful employment practice."

Another section of the Act expands the time for filing a charge from 180 days to two years. That Act also amends Title VII to allow the time for filing of charges to begin on the date the unlawful employment practice "has been applied to affect adversely the person aggrieved...."

Evans v. Jeff D.[32]

In *Evans v. Jeff D.*, the Supreme Court ruled that a district court is not prohibited by 42 U.S.C. Section 1988 from approving a proposed settlement in a civil rights class action case which offers relief that is conditioned upon the waiver of attorney's fees.

Respondents brought a class action against petitioners in federal district court on behalf of children who have been or will be placed in petitioners' care. They alleged that deficiencies in educational and health care services violated the federal and state constitutions and various federal and state statutes. Injunctive relief, costs and attorney's fees were sought. The district court approved a settlement granting the injunctive relief but conditioned upon respondents' waiver of any claim of attorney's fees. The court of appeals invalidated the fee waiver, left the rest of the agreement intact, and remanded to the district court for a determination of a reasonable fee.

In reversing the court of appeals, the Supreme Court found the issue to be whether the district court had a duty to reject the settlement because of its waiver clause even when the settlement offered is equal to or greater than that which plaintiffs could reasonably expect to achieve at trial. The Court interpreted the language of Section 1988 as creating an eligibility for attorney's fees for the plaintiff and did not find that the Act prevents waiver of this eligibility or assignment of this right to an attorney. Hence, the Court concluded that it is not necessary to interpret Section 1988 as a rule prohibiting settlements with fee waiver conditions in order to be faithful to the intentions of the Act.

A second question analyzed by the Supreme Court was whether the district court abused its discretion by approving a settlement which included a fee waiver. In noting that Fed. R. Civ. P. 23(e) requires that a court approve the terms of any settlement of a class action before it can become effective, the Court rejected the contention Section 1988 would disallow approval of an attorney fee waiver. No language in the Act stipulates that the award of attorney's fees is a requirement, especially when the respondents are not directly challenging the waiver. Thus, the Act is simply another remedy available to the respondents. The Court concluded that the district court did not abuse its discretion and also found that the district court was correct in finding that the acceptance of the settlement did not breach any ethical duty on the part of respondent's counsel.

Effect of Act

Waiver of Attorneys' Fees. The Act (section (9)(2)) prohibits the approval of any consent decree that includes a waiver of attorneys' fees unless both attorneys attest that the consent agreement was not compelled as a condition of settlement.

Other Provisions of the Act

Compensatory Damages. The Act (section 8(A)) would allow plaintiffs to seek compensatory damages (not including back pay or any interest thereon) which presumably means damage for pain and suffering. Currently, Title VII allows only for back pay and equitable relief. Plaintiffs may also seek punitive damages against private employers only.

Trial by Jury. The Act (section 8) also provides for trial by jury where compensatory or punitive damages are sought. Currently, Title VII does not provide for trial by jury.

Retroactivity. The Act (section 15) makes each section retroactive to the day before the Supreme Court case which the section was intended to overturn.

Jett v. Dallas I.S.D. and Patterson v. McLean Credit Union[33]

The plaintiff in *Jett v. Dallas I.S.D.* is a white high school coach who sued the principal of the school and the school district, claiming that he was transferred and ultimately forced to resign because of his race and the exercise of his free speech rights.

The record in the case was confusing and during oral argument the members of the Court seemed confused as to which issues were before it. The original complaint included only equal protection and section 1983 claims. The jury was not instructed on the section 1981 issue. The lower court ruled that section 1981 was the vehicle for an action claiming an equal protection violation. Jett's counsel claimed during oral

argument that the district has not preserved its argument that there is no cause of action under 1981.

Section 1981 gives all persons the same right to make and enforce contracts and to enjoy equal rights under the law "as is enjoyed by white citizens." The Court's primary reason for agreeing to hear the case was to review the question of whether a private person can sue a public entity for damages under 1981. The lower court ruled that public entities cannot be held liable under a *respondeat superior* theory for their employees' violations of section 1981.

Jett also contended that the superintendent's ratification of the discriminatory act of the principal made the decision a "policy" of the school district, thus subjecting the school board to liability under Section 1983. The lower court disagreed, citing Supreme Court plurality opinions in *St. Louis v. Praprotnik,*[34] and *Pembaur v. Cinncinatti.*

In a 5-4 decision written by Justice O'Connor, the Court affirmed the decision as to section 1981, but remanded the section 1983 issue for a determination as to who has the final decision-making authority as to employee transfers.

At the outset the opinion noted that the school district did not raise the issue of whether the type of injury alleged to have been suffered by the plaintiff is covered by section 1981. Earlier in the term the Court ruled in the case of *Patterson v. McLean Credit Union,* that section 1981 does not cover racial harrassment. Its coverage is limited to the "making" of contracts, not their administration. Undoubtedly had the school district raised the issue, the Court would have held that Jett's racial harrassment claim is not cognizable under section 1981. However, since the issue was not raised, the Court assumed without deciding that the principal violated Jett's section 1981 rights.

Nevertheless, after citing the legislative history of both sections 1981 and 1983, the Court held that section 1983 is the exclusive damages remedy against a state actor for violation of rights guaranteed by section 1981.

During oral argument on the section 1983 issue, the question was raised as to whether the school district should be held liable for the actions of the superintendent in ratifying the principal's discriminatory action. Jett's attorney argued that the question of whether the superintendent was a policymaker was not determined by the lower court. The school district's attorney argued that the superintendent cannot be a policymaker. Justice O'Connor asked if the superintendent had the "final right to transfer" Jett. The district's counsel replied that the superintendent had to act within the district's policies. He could not transfer Jett in violation of law. Justice Scalia chimed in that a municipality cannot avoid section 1983 liability merely by adopting a general policy that employees cannot violate the law. But the district's counsel replied that there was no evidence of a custom in this case. The action was a case of "discrete decision-making."

The Court agreed with the court of appeals that the trial judge's instruction to the jury on the question of the school district liability was in error. That instruction provided that the school district would be liable for the wrongful or unconstitutional actions of the superintendent and school principals against school district personnel. "The instruction seems to rest either on the assumption that both Principal Todd and Superintendent Wright were policymakers for the school district, or that the school district is vicariously liable for any actions taken by these employees." The Court remanded the case to the court of appeals to determine whether the superintendent possessed final policymaking authority regarding employee transfers, and if so, whether a new trial was required to determine the responsibility of the school district for the principal's actions in light of the determination as to the superintendent's authority.

Effect of the Act

The Act (section 1107(B)) contains a provision that would overturn the *Jett* principle that Section 1983 is the exclusive remedy against public entities. The new provision states: "Except as expressly provided, no Federal law protecting the civil rights of persons shall be construed to restrict or limit the rights, procedures, or remedies available under any other Federal law protecting such civil rights."

The Act also overturns *McLean Savings* by amending Section 1981 to provide that the "right to 'make and enforce contracts' includes all manner of treatment after the making of the contract" (section 12).

END NOTES

1. *Jett v. Dallas Independent School District*, 109 S.Ct. 2702 (1989).

2. *City of Canton, Ohio v. Harris*, 109 S.Ct. 1197 (1989).

3. *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986).

4. *DeShaney v. Winnebago County Department of Social Services*, 109 S.Ct. 998 (1989).

5. *Public Employees Retirement System v. Betts*, 109 S.Ct. 2854 (1989).

6. *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977).

7. *Allegheny County v. Greater Pittsburgh ACLU*, 109 S.Ct. 3086 (1989).

8. *Lynch v. Donnelly*, 465 U.S. 668 (1984).

9. *Frazee v. Illinois Department of Employment Security*, 109 S.Ct. 1514 (1989).

10. *Dellmuth v. Muth*, 109 S.Ct. 2397 (1989).

11. *Will v. Michigan Department of State Police*, 109 S.Ct. 2304 (1989).

12. *Board of Education of the Westside Community Schools Dist. 66 v. Mergens*, 867 F.2d 1076 (8th Cir.), *cert. granted*, 109 S.Ct. 3240 (1989).

13. *Pitts v. Freeman*, 887 F.2d 1438 (11th Cir. 1989).

14. *Green v. County School Board*, 391 U.S. 430 (1968).

15. *Morgan v. Nucci*, 831 F.2d 313 (1st Cir. 1987).

16. *Dowell v. Board of Education of Oklahoma City Public Schools, Independent District No. 89*, 890 F.2d 1483 (10th Cir. 1989).

17. *Howlett v. Rose*, 537 So.2d 706 (Fla. 2d Dist. Ct. App. 1989).

18. *Stoneking v. Bradford Area School District*, 856 F.2d 594 (3rdCir. 1988), *vacated and remanded*, 109 S.Ct. 1333 (1989), 882 F.2d 720 (3rd Cir.), *cert. denied*, 110 S.Ct 840 (1990).

19. *Smith v. Sowers*, 869 F.2d 591 (3rd Cir. 1988), *vacated and remanded*, 109 S.Ct. 1634 (1989), 882 F.2d 720 (3rd Cir.) *cert. denied*, 110 S.Ct. 840 (1990).

20. *Pagano v. Massapequa Public Schools*, 714 F.Supp. 641 (E.D. N.Y. 1989).

21. *D.T. v. Independent School District No. 18 of Pawnee County, Oklahoma*, 894 F.2d 1176 (10th Cir. 1990).

22. *Ingraham v. Wright*, 430 U.S. 651 (1977).

23. *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989).

24. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

25. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

26. *Wards Cove Packing Company, Inc. v. Atonio*, 109 S.Ct. 2115 (1989).

27. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988).

28. *Dothard v. Rowlison,* 433 U.S. 321 (1977).

29. *Griggs v. Duke Power Company,* 401 U.S. 424 (1971).

30. *Martin v. Wilks,* 109 S.Ct. 2180 (1989).

31. *Lorance v. AT & T Technologies, Inc.,* 109 S.Ct. 2261 (1989).

32. *Evans v. Jeff D.,* 475 U.S. 717 (1986).

33. *Patterson v. McLean Credit Union,* 109 S. Ct. 2363 (1989).

34. *St. Louis v. Praprotnik,* 485 U.S. 112 (1988).

INVESTIGATING ALLEGED WRONGDOING BY EMPLOYEES IN THE SCHOOL SETTING

Richard E. Bump
Caplan & Earnest
Boulder, Colorado

and

Kelly Frels
Bracewell & Patterson
Houston. Texas

Editor's Note: This article is an excerpt of NSBA's recent publication *Investigating Alleged Wrongdoing by Employees in the School Setting.* To order the complete text, refer to page 9-2.

One of the most frequent problems confronting employers is the need to investigate allegations of or suspicions that an employee has been involved in misconduct and to take appropriate action when the evidence substantiates the wrongdoing. School district employers are no exception. Due to the application of countless state and federal constitutional, statutory, and regulatory provisions, the importance of fair and objective investigations and discipline is even more pronounced in the public school setting.

This monograph is intended to provide practical tips for handling these investigations in a manner ensuring fair treatment for the accused while affording appropriate and efficient remedies to the school employer. It is not, however, intended as legal advice. Each investigation is different, so a qualified school attorney should be consulted as the need arises.

THE LEGAL CLIMATE

Public schools are political subdivisions of the state, and they generally receive federal financial assistance. As a result, activities of school districts and school officials constitute "state action" under the Fourteenth Amendment making federal constitutional guarantees applicable to public school employees. In addition to the application of the Constitution, civil rights statutes such as 42 U.S.C. § 1983[1] also apply. Also significant is the fact that the provisions of 42 U.S.C. § 1988 allow for the recovery of attorneys' fees in successful civil rights suits. The concern for incurring the risks of these damage claims and attorneys' fees requires careful attention to procedures when dealing with public school employees.

Dealing with employees in this legal climate begins with the thoughtful promulgation of policies and procedures which ensure compliance with the law. These policies and procedures are useless, however, unless they are carefully followed and enforced. It should be kept in mind that generally, when courts are reviewing claims in the school arena, they will look first to see if there were any policies and procedures in effect and, if so, whether they were followed. If these inquiries are satisfied, administrators and boards stand a significantly better chance that their judgments will be supported by a court.

In addition to board policies, procedures, and regulations, school boards must also contend with the legal framework created by negotiated agreements, employee contracts, handbooks, manuals, and arbitration and court decisions interpreting them. Even though most of these regulatory influences come into play when managing employee misconduct and discipline, the common theme in their adoption or application should be the assurance of fair treatment to the employee.

Distinction from the Criminal Context

Achieving fairness and providing due process in the workplace does not mean that employ-

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ees who are accused of or suspected of wrongdoing are entitled to all the standards of investigation and prosecution that would apply in a criminal setting. To the contrary, courts have traditionally recognized that the public employer has a substantial interest in investigating misconduct and in dealing with employees in a more informal way that does not impose significant administrative burdens or intolerable delays.[2]

The Due Process Standards.

> The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.

Loudermill v. Cleveland Board of Education, 470 U.S. 532, 546 (1985).

The Supreme Court in *Loudermill* outlined the general ingredients for providing due process to public employees prior to dismissal or suspension without pay, stating that the employee is entitled simply to (1) oral or written notice of the charges against him; (2) an explanation of the employer's evidence; and (3) an opportunity for the accused to present his side of the story. *Id.* "To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.*

The Importance of Policies and Personnel Practices.

As in effective student discipline, fair treatment of employees starts with clearly articulated, yet simply stated, reasonable standards of conduct set forth in objective employee discipline policies.

In the development of policies and handbooks, consider whether the school district's employees have a property interest in their employment, *i.e.*, an entitlement to continued employment that can only be interrupted for good or just cause. If employees are employed at the will of the board with no definite term, the adoption of policies and handbooks delineating causes for termination can inadvertently convert the "at will" relationship into a constitutionally protected property right to continuous employment.

THE REPORT OF THE ALLEGED WRONGDOING TO SCHOOL AUTHORITIES

Reports of wrongdoing may come from a variety of sources including students, parents, or other patrons of the school district, other employees, board members, law enforcement officials, or the media. The source and identity of the complainant or reporter and the nature of the accusations will affect the process and extent of the investigation.

Anonymous Tips

Anonymous tips of alleged wrongdoing can, in some very limited circumstances, be relied upon to initiate an investigation of an employee. However, great care must be taken to avoid accusing an employee of wrongdoing based upon an anonymous tip alone without other corroborating evidence. People who do not identify themselves in making allegations against others will surely not be of any assistance at any point in the investigatory or disciplinary process. Unless the employee admits to the conduct or independent evidence is obtained, a cooperative witness will be needed to prove the allegations.

Verbal Complaints

Upon receipt of a verbal complaint from a known source, reasonable efforts should be made to promptly reduce it to writing, preferably in the complainant's own handwriting. *See infra* at 7-3. Reducing the complaint to writing or to a signed statement will help assure that the informer will testify as a witness, that he or she will not experience a convenient memory lapse later, and that the employer will not be accused of bad faith if the witness later withdraws the claim or fails or refuses to cooperate. If the complainant is unwilling to place the allegations in writing, the claim will suffer from many of the same problems and inadequacies as an anonymous tip and, in the absence of independent corroborating evidence, may not be sufficient to justify pursuing.

Written Complaints

Written complaints or statements reduced to writing, identifying the person(s) making the claims, will, with few exceptions, always justify an investigation. Placing accusations in writing is itself some independent assurance that the claim of wrongdoing, or at least the perception by the complainant, is genuine.

Criminal Complaints

Some complaints may allege criminal activity or may in fact be initiated by police authorities for conduct related or unrelated to the workplace. Regardless of how these complaints arise and regardless of whether law enforcement officials are involved, if the employer feels that the accusations could involve and have a nexus to the employment relationship, an independent, administrative investigation should be undertaken in virtually every case.

As mentioned at the outset, the standards applicable to investigations in the workplace are different from those conducted by the police. Evidence of wrongdoing, insufficient to sustain a criminal conviction, may be more than adequate to justify discipline or discharge. In some instances, the silence of the accused may be used to infer wrongdoing in the employment context, where the privilege against self-incrimination would prevent such an inference in a criminal proceeding.[3] The timing of the investigation and disposition of the employment decision usually will proceed independently of and faster than the criminal proceedings. The courts have typically held that employers may not be enjoined from investigating and acting upon job related complaints, even though the complaints may also be the subject of a pending criminal prosecution.[4]

Further or Other Alleged Wrongdoing Arising out of an Investigation

Many times an investigation into a specific incident or accusation may expand into other claims, persons, or incidents. For example, a complaint of employees drinking in the parking lot after work hours may, upon investigation, lead to evidence of widespread alcohol or drug abuse among an employee group. The key considerations here must be to not close the door or act on a complaint precipitously. Wait until the investigation is complete. Should disciplinary action be taken before other revelations of misconduct come out and are investigated, evidence of the wrongdoing can be lost. However, if later discovered, evidence of other wrongdoing should be pursued in the same manner as the initial case. Criminal procedural standards do not apply and double jeopardy defenses will not prevent the district from taking employment action when subsequent evidence is obtained.

News Media Reports

The media may often be a source of accusations against school employees. Reporters generally do not discount the anonymous tip in the same manner administrators do, and an otherwise anonymous "tipster" will often talk to reporters who promise absolute confidentiality. When claims do surface through the media, they should be independently and promptly investigated. Reliance should not be placed upon news accounts for evidence; rather, independent statements, even from the investigative reporter, should be obtained when possible. It should be kept in mind that the information from an anonymous tipster may not justify taking action, even if the tipster has found a reporter's ear. A school administrator investigating the matter may never be able to talk with the reporter's source.

Dealing with the "Whistle Blower"

Many states have enacted statutes providing special protection or privileges to those employees who come forward to report violations of laws by governmental officials or other workers.[5] Under these circumstances, employee-"whistle blowers" are typically accorded immunity from recrimination for reporting, even if they circumvent established chain-of-command procedures. Good management procedures dictate that when complaints are lodged "out of management sequence," they should be subtly referred back to the appropriate level supervisor. The supervisor should also be made aware of his or her responsibility to deal with the issue and not "pass the buck." This promotes resolving complaints informally at the immediate supervisory level. An exception to this general rule is that a whistle blower should not be required to

report a violation of the law to the person who violated it if there is a perceived threat of recrimination.

COMMON AREAS OF COMPLAINT

The breadth, degree, and timing of any investigation will be determined in large measure by the nature of the complaint. Whether the conduct or incident may involve one or several persons; whether potential criminal prosecution may follow; whether the conduct is suspected to be habitual or incidental; and whether the actions occurred on or off school premises or on or off duty hours are some of the questions which should be considered from the outset. Where the complaint involves off-duty misconduct, the burden for the school to carry in discipline will include not only establishing the facts of what happened but how the actions substantively and adversely affected the operations of the school district or the employee's effectiveness to perform his or her job.[6]

There are many types of complaints which occur with some frequency in the school setting. Although every investigation will be different, in these recurring areas the investigation plan can likely be developed based upon prior ones. Standardized questions, outside agency contacts and telephone numbers, and prior arbitration decisions are just a few of the documents which can serve as a starting point. The common areas include:

- Misuse or misappropriation of funds, equipment, materials, or personnel.
- Sexual harassment or sexual misconduct.
- Drug or alcohol abuse.
- Mistreatment of children, including child abuse, injury to a child (physical or psychological), misapplication of corporal punishment laws and policies, and criminal charges.
- Theft.
- Conflicts of interest.
- Kickbacks or embezzlement of funds.

CONDUCTING THE INVESTIGATION

Conducting a fair investigation requires adherence to the following overriding practical guidelines: a recognition and preservation of the dignity of the individual, treating the accused in a manner in which the investigator would expect to be treated if he or she were the subject of the investigation, and presuming innocence until the investigation is complete. With these goals in mind, the investigator will not only have a greater likelihood of discovering the facts but will also significantly help assure that the decision made at the conclusion of the investigation will be upheld.

In addition to these general principles, investigations should be carefully planned in advance, systematically conducted, impartial (objective), confidential to the extent permitted by state law, and timely. To assure these goals, some school districts establish structured procedures concerning how investigations will be conducted. These procedures have the advantage of promoting thoroughness and consistency in application, avoiding improper actions by investigators and the use of improper or inappropriate investigative techniques, and allowing all employees to understand in advance what to expect if they are accused of misconduct. A disadvantage is that the procedures may become too restrictive and not allow the flexibility required to properly investigate different varieties of complaints. Such standardized procedures should ordinarily not be formalized into adopted board policies because to do so might create an "entitlement" argument which would convert an "at will" employment relationship into one where discharge may only be "just cause." *See e.g., Loudermill,* 470 U.S. at 542. In addition, failure to substantially follow adopted board policy or procedure may itself become an alleged violation of due process or an alleged violation of contract under state laws with respect to the affected employee.[7] Some courts have even held that an employment manual in the private sector creates rights enforceable under contract principles.[8]

Receiving the Complaint

The beginning point of a civil or criminal investigation is essentially the same. It starts with the receipt of the complaint. Based upon this, the matter to be inquired into must then be

defined, the sources of available information must be identified, and the investigation must be initiated and continued through to some disposition.

Complaints against employees should be as factually accurate, complete, and as timely as possible. This is dependent upon who provides and records the information. To promote sufficiency in this process, standard complaint forms can be developed and personnel should be instructed in how to complete them. A simple guideline of "who, when, where, what, how and why," if addressed will go a long way here. In recording the complaint, the "Jack Webb theory" is important to keep in mind; that is, "Just the facts, ma'am, just the facts." Avoid writing conclusions or opinions in the complaint which are not justified. Do not include statements or make references to matters which may inadvertently affect or implicate civil rights or the exercise of constitutional rights such as free speech or association.

Determining Whether an Investigation Is Necessary and How It Should Be Conducted

The first order of business after a complaint is received is to determine whether an investigation by the school district is even necessary. This will depend, as noted above, on such considerations as the nature and seriousness of the allegations, the extent of other employee involvement, whether the allegations have been admitted, or whether the matter can be established by the testimony of the complainant alone. Employee relations concerns must also be considered. For example, while drug testing may uncover substance abuse among employees, it may create serious personnel problems if not handled properly.

Priorities must be set and estimated timelines should be established as a part of any investigation plan. Consideration should be given to the following:

- Interview those persons first who may not be available later, whose willingness to cooperate may diminish, or whose accurate recollection must be preserved *(e.g.,* an eyewitness).
- Observe, photograph, and/or take control over things or locations which may not be available later or which may change.
- Interview persons next who are perceived to have the most extensive or fundamental information (usually includes the complainant).
- Interview those with less extensive information which is relevant but not critical.
- Interview hostile witnesses near the end of the process.
- Many feel it is advisable to interview the accused last.
- In certain cases, it may be desirable to have the accuser confront the accused.

In determining the investigative techniques to be used, consider the following:

- Is the technique *(e.g.,* surveillance, undercover informant, polygraph, drug/alcohol testing, sworn affidavit, search, etc.) supportable by justifiable reasons; what are these reasons; and which are the least intrusive to achieve the desired result?
- Will the technique supply a significant, necessary piece of evidence?
- What will be done with the evidence, if secured?
- Are the results of the technique reliable?
- Will the technique appear to the public and/or ultimate decision-maker to strike and maintain a fair balance between the rights of the administration and the rights of the employee, or will it appear to be oppressive?
- Are the procedures consistent with the philosophy of the district toward its employees?

- How will the investigation technique affect labor peace and employee relations?

Personnel Conducting the Investigation

In an effort to resolve complaints at the initial, informal level, the immediate supervisor of the accused employee should ordinarily be responsible for the investigation. Exceptions to this general rule would include circumstances where the supervisor is involved in filing the complaint, where the supervisor him or herself may be the subject of the investigation, where the supervisor's involvement would "taint" the decision, or where the complainant or witnesses may not be comfortable or candid in the investigative interviews.

In sensitive matters or investigations of significant potential consequences, the school district's attorney may supervise the process. Private investigators can also be effective. When it is determined to go to an outside investigator, it is important to have the school district attorney retain the investigation and direct the inquiry. The report should also go to the attorney. In this way, the confidentiality of the results of the investigation can generally be maintained by the attorney-client privilege or attorney work product until a decision is reached by the administration on how to proceed. Private investigators also have the significant advantage of being able to testify at disciplinary or termination hearings with detached, independent credibility.

The school attorney should avoid becoming a fact witness which will generally disqualify the attorney from prosecuting a termination or representing the district in subsequent litigation.

The school district's independent auditors are also a source of potential investigative assistance. They are separated from the daily process and in some states enjoy similar, recognized privileges which can protect the confidentiality of the facts until they can be analyzed and a course of action determined.

Police agencies or county or district attorneys should normally be advised if the investigation produces evidence of possible criminal activity.

Interviewing the "Allegator" and Other Witnesses

After identifying the person to be in charge of the investigation and the development of an investigation plan, the first step is normally to interview the complainant. It should be kept in mind that this interview is *just the beginning* of the investigation and that the accused must be presumed innocent until facts show the misconduct. There is a tendency for investigators to try to gather information to prove what they have already determined or suspect to be true rather than what actually happened. Focus on the *facts;* avoid conclusions at this stage. Get the "who," "what," "where," "how," and, if relevant, "why."

In the interview of the complainant and non-hostile witnesses, the following guidelines should be considered:

- To put the witness at ease, consider interviewing at or near his or her area of work, one-on-one (one may want to do the opposite with the hostile witness).

- Unless urgent, accommodate the person interviewed; *i.e.,* time of day/week; interview during work hours (avoid interviews on Friday afternoon or close to the end of the workday unless it is necessary to accommodate the person).

- Review the complainant and witnesses' personnel file as soon as possible, preferably before the interview; get a feel for the person's value system, credibility, and prior employment history.

- Outline the questions and develop standard questions in advance of the interviews. On key questions, write them out and ask them the same way of each person. Avoid leading questions because they may lead to answers which reconfirm the investigator's preconceived views.

- Advise the witness of the degree to which you can keep the information in confidence. Generally, confidentiality

can be maintained through the investigation, but confidentiality depends on state law.

- Consider not taking extensive notes during the initial stages of the interview. Listen to the whole story once, then go over it again for note-taking purposes.

- It is generally advisable to obtain a written statement from witnesses, if practicable. In so doing, whether written by the witness him or herself or transcribed by the investigator, the following matters should be considered:

  – Concentrate on the *facts,* and avoid conclusions.

  – Statements should be prepared in the context of the first person, *e.g.,* "I saw, and he asked me to . . . . He gave me . . . ."

  – Write out the narrative for signature by the witnesses. It is sometimes effective to ask the witnesses to write out a narrative in advance of the interview, then review it with them. Also, with minors who are capable, it is very helpful to have them write out, date, and sign their own statement. This technique not only assures that witnesses will be available to testify and have their recollection refreshed as to what happened later, but also avoids allegations that the interviewer "put words in their mouths."

  – When a statement by a witness is to be signed, ask the person to read the statement, then confirm accuracy by asking such questions as: "Is this pretty much what you said?" "Anything you would like to add or change?"

  – Get the statement signed and notarized, if possible. If the person refuses to sign, make a note that the witness refused.

  – If one wishes to make the statement an affidavit, include a verification, *e.g.,* "Based upon my personal knowledge, the above facts are true and correct." (See the sworn affidavit specimen form and discussion *infra at 7-9.*)

  – Have someone witness that the statement was taken and signed. This avoids later allegations that the person was coerced to sign, that the signature was forged, or that the interviewer put words in the person's mouth.

- Be sure the witness has a person of the same sex to complain to in sexually-related cases, especially when claims of sexual harassment or alleged sexual abuse are involved.

- In most cases and especially with minors, it is prudent to have a person of the same sex as the witness present if the interviewer is of the opposite sex. This is especially desirable in sex-related cases.

Special Considerations in Interviewing Minors

- Check your state statutes and court rules about the competency of minors as witnesses.

- Consider securing the assistance of a child psychologist or a person trained in interviewing children to prepare the investigator for the interview or to participate in the interview of a child.

- Use a vocabulary which the child can understand.

- A child's concept of time is different. Use relations in time to holidays, events, and birthdays to identify time periods.

- Generally, one should obtain parental consent before interviewing young children. The older the child, the less

parental involvement is necessary. Consideration should be given to having the child's parents present at the interview. If the parent is not implicated in the complaint, it is normally desirable to offer the parent the opportunity to be present during any questioning.

- Involve professionals, including child psychologists, social workers, and counselors when necessary to develop the facts.

Confronting the Accused

In many investigations of individual wrongdoing, it is best to interview the accused last. This is especially true when the accused might exert pressure on others not to testify or when the accused may destroy evidence. After interviewing other fact witnesses, the investigator will be able to follow up with questions to rebut, explain, or refute statements by the accused which seem inconsistent, inaccurate, or incomplete. As some investigators put it, you want to be "loaded for bear." This strategy is similar to that used by attorneys in taking the deposition of the key party in the case. There is no substitute for being thoroughly prepared with as many facts as possible.

The following guidelines should be observed:

- Plan the interview in advance. Like other interviews, the interviewer should outline or write out the questions or list the topics he or she will want to ask. This plan should not be so rigid that the investigator will risk losing spontaneity or being able to follow up with questions. The investigation plan and outline should serve as a checklist to assure that the investigator covered everything desired.

- Complete as much of the investigation as possible beforehand. Organize and review all the evidence obtained to date.

- Identify the key facts which require explanation.

- Consider the time, place, and tone of the interview and the psychological dynamics.[9]

- Review the personnel file *in advance.* This helps evaluate a witness' penchant for truthfulness, identify previous or similar problems, and potential penalty if the investigation results in a finding of guilt.

- Identify the applicable policies or rules involved in the complaint to determine what conduct may involve a violation.

- Determine *before* the interview what the philosophy of the school district is concerning pursuing any available criminal charges against an employee.

- Once a time and place has been selected, notify the employee (one or two days in advance) through his or her supervisor of the time, place, and purpose of the interview.

- Consider allowing the accused to have a "representative" present at the interview, especially when the allegations, if true, could result in termination.

- Avoid making decisions of guilt or what penalty might be applicable during the interview unless there is an admission by the employee.

- Ensure that responses are voluntary and the procedure and general atmosphere appear fair if challenged and reviewed later by the board of education, court, jury, or hearing officer.

- The interviewer must control his or her emotions; be courteous; avoid arguments; and must not get angry. The tone of the interview must be investigative, designed to discover. The tone should not be punitive, coercive, or adversarial.

- The investigator should never make promises or representations that he or she can, will, or will not do something that cannot be delivered.
- Avoid giving advice to the accused on what he or she should do.
- Avoid making threats or giving an ultimatum. The investigator may and should, however, set deadlines and disclose what will happen next.
- Do not be "cagey." Let the accused know the purpose of the meeting, what the charges or suspicions are, the evidence of the alleged wrongdoing, that investigation may result in disciplinary action, and (where appropriate) that the school district may be required to turn over information to police.
- Do not physically prevent the accused from leaving the interview. (Employment consequences, however, may flow from the accused's failure to cooperate.)
- Have a range of options ready for discontinuing the employment relationship and the authority to propose them to the accused. This interview may result in admissions of the wrongdoing, and the only remaining issue will become the ultimate penalty or disposition of the employment relationship.
- If the employee is not on leave at the time, consider whether placing the accused on administrative leave is necessary during the completion of the investigation and until disposition. Ascertain who has authority to implement and direct such leave.
- Preserve the opportunity for the person to maintain his or her personal dignity.

The Sworn Affidavit and the Fifth Amendment

As a part of a school district's investigation of alleged wrongdoings by an employee, the administration may require employees to answer questions, under oath, regarding the matter in question. Such an investigation technique is supported by law so long as two conditions are met: first, the questions asked must be specifically, directly, and narrowly related to the issue being investigated and relevant to the individual's duties, and second, any sworn statement given by an employee may not be used against that employee in any subsequent criminal prosecution. Under most state laws, any employee who refuses to answer work-related investigation questions or to give a sworn statement under the terms and conditions ordered by authorized school officials may be disciplined or dismissed.[10]

The affidavit form should be simple and easily understood. It normally opens with basic questions like those on Appendix C which set out the authority of the school to require answers to the questions and advise the employee that his or her answers are not given voluntarily but are required as a condition of continued employment. Only questions relevant to information necessary to the issues being investigated should be included to avoid infringing upon the privacy rights of employees.

Accused Confronts Accuser

When one employee or patron of the school district has accused another employee of wrongdoing warranting an investigation, it is generally not advisable to have the accused confront the accuser during the early stages of the investigation process. Arranging such a confrontation forces the administrator to accept one version over the other at the initiation of the investigation and automatically puts the two employees or patron and employee in an adversarial posture. An accused employee has no constitutional right to confront an accuser during the investigation. This is not, however, generally the case at a subsequent hearing. Ordinarily, unless there are significant and substantial reasons to justify otherwise, it will be necessary for the person making the accusations to testify and be present at the hearing in order to be cross-examined by the person being accused.

The Use of Tape Recorders or Court Reporters

If it is necessary to obtain sworn statements from witnesses, one may consider the use of a court reporter. An alternative to a court reporter is a tape recorder. Tape recorders have similar advantages and disadvantages.

While it is not necessary that the supervisor obtain the consent of the employee to tape the interview, in all cases when it is determined to tape, the investigator should be certain that all persons present *know* that it is being taped. Taping by a school official without the knowledge of the other party creates an atmosphere of unfairness and oppression and may, in fact, be illegal in certain states.

The Use of Polygraph Exams

For several years, the use of polygraph tests by employers was a standard practice, but many states have now begun to regulate or prohibit the use of such tests.[11] As of 1986, only six states did not regulate polygraph exams in any manner.[12] The United States Congress has itself adopted the "Employee Polygraph Protection Act of 1988." The rules implementing the Act are found at 29 C.F.R. Part 801 (December 27, 1988). This Act, however, specifically excludes public sector employees, such as school districts.

Accordingly, when polygraph testing is considered, the employer must be aware of the legal risks associated with their use. The following factors should be considered carefully:

- Is the use of the polygraph absolutely necessary? Would a sworn affidavit or the use of another investigatory technique achieve the same results?
- If a polygraph is deemed necessary, current state laws should be examined and *strictly* followed.
- A release from the employee to be tested should be secured, but it should not waive the employee's rights against self-incrimination in a criminal proceeding as protected by the Fifth Amendment.
- Only those employees necessary for a complete investigation should be given a polygraph. The employees who take the test should be informed in writing that the request carries no accusations.
- Employees with known nervous or mental conditions should not be tested. The examiner should be instructed to stop the examination if the employee becomes emotionally upset.
- The questions should not invade personal privacy interests and should only involve information absolutely necessary to the investigation.
- Test results should be discussed only with those employees who absolutely need to know.
- Treat all employees whose responses indicate a variation from the truth uniformly. It must be decided whether such results will be considered conclusive or merely probable evidence of guilt or innocence.

As this discussion demonstrates, the use of polygraph tests is fraught with problems in methodology, administration, and results. Accordingly, the need to use a polygraph test should be especially compelling in order to negate the formidable drawbacks inherent in the tests.

Privacy Rights and Confidentiality

Public disclosure of private facts can constitute an invasion of privacy. Therefore, throughout the investigation, school administrators should strive to protect the privacy rights of the employee and attempt to maintain the confidentiality of the investigation and its results, as it is being conducted and for the future. Privacy rights can be protected by posing questions to employees during the investigation which are narrowly drawn and elicit only that information necessary to the furtherance of the investigation. Additionally, the investigation itself should be limited to job performance and effectiveness.

The questions asked should have a nexus to the issues being investigated. The questioner should have basic questions already formulated to prevent the careless posing of an irrelevant, intrusive question. Also, the investigator should be careful to not make off-hand comments concerning the employee's responses or personal characteristics of the employee such as age, sex, religion, etc.

Searches and Drug Testing

Traditional Searches

As stated earlier, the Supreme Court has resisted applying criminal law standards in the context of investigating employee misconduct. This resistance was clearly demonstrated in *O'Connor v. Ortega,* 107 S. Ct. 1492 (1987). O'Connor involved the search of the office of a psychiatrist employed by a state hospital. The Court recognized that "[i]n the case of searches conducted by a public employer, we must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control and the efficient operation of the workplace." 107 S. Ct. at 1499.

Citing *New Jersey v. T.L.O.,* 469 U.S. 325 (1985), which adopted a "reasonable suspicion" standard for student searches in the school setting, the Court held that, "public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." 107 S. Ct. at 1502. Reasonableness of a search is measured by two factors. First, the search must have been justified at its inception. Second, the search as actually conducted must be reasonably related in scope to the circumstances which were the basis of the search in the first place. *Id.*

Drug Testing as a Search

Another volatile issue related to searches is the question of drug testing. Testing for the presence of drugs, either through urinalysis or blood testing, is a search subject to the protection of the Fourth Amendment. *National Treasury Employees Union v. Von Raab,* 109 S. Ct. 1384 (1989); and *Skinner v. Railway Labor Executives' Assn.,* 109 S. Ct. 1402 (1989). The Fourth Amendment prohibits only unreasonable searches, and as *National Treasury Employees Union* and *Skinner* illustrate, where the governmental interest is compelling enough, the government may require drug testing of its employees.

Random drug tests which are not predicated on reasonable individualized suspicion have not been approved by the courts. *See City of Palm Bay v. Bauman,* 475 So.2d 1322 (Fla. App. 5 Dist. 1985); *Capua v. City of Plainfield,* 643 F. Supp. 1507 (D.N.J. 1986); *Lovvorn v. City of Chattanooga,* 647 F. Supp. 875 (E.D. Tenn. 1986). Courts have, however, approved tests of specific individuals when there is individualized suspicion of an employment-related activity which would be revealed through the test. This standard is a flexible one that attempts to balance the government's rights as an employer and as a provider of services to the public against the individual's right to privacy.

Once the threshold reasonable suspicion issue is satisfied, the next concern is whether the drug testing program, even if properly justified in a specific case, bears a rational relationship to a legitimate government purpose. Given current technology, urinalysis tests cannot measure whether an individual who tests positive for the presence of drugs is actually under the influence of drugs at the time of testing. (A blood test for alcohol presents less of an issue in this regard.) As a result, some courts have found that the use of urinalysis tests as the sole basis for severe discipline of employees is not rationally related to a legitimate government purpose and thereby violates due process. In other words, unless the effects of drug or alcohol use are job-related, any adverse employment action taken on this basis might be challenged as lacking a rational tie to the government's interest. *Doe v. Hampton,* 566 F. Supp. 265 (D. D.C. 1977); *Merritt v. D.O.J.,* 6 M.S.P.B. 653 (1981) (off-duty use of marijuana does not possess a sufficient nexus to officers of the federal service to justify discharge).

In the policy attached as Appendix D, the required nexus is supplied in the definition of reasonable suspicion, which requires evidence which ties the drug or alcohol use to the workplace. This concern is also addressed by the policy statement in the regulation which sets out the school district's goal of a drug-free environ-

ment in the schools and the various interests that this policy will promote.

The next area of concern is the need to follow specific procedures relating to the administration of the test which meet due process requirements. These procedures should include the use of a testing technique that will be accurate and susceptible to confirmation, the utilization of a chain of custody to ensure that the possession of the sample from the employee from whom it was taken to the person administering the test is documented, and that samples are properly stored. A sample of the specimen must also be preserved for independent testing to protect the employee's right to due process. *Banks v. F.A.A.*, 687 F.2d 92 (5th Cir. 1982); *Brewer v. Motor Vehicle Dept.*, 720 P.2d 564 (Colo. 1986).

The final concern raised by such a policy is the effect of § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), which protects the employment rights of handicapped individuals in programs receiving federal government aid or assistance. The Rehabilitation Act defines handicapped individuals as any person who has a physical or mental impairment which substantially limits one or more of that person's major life activities. The definition of "handicapped individual," however, specifically excepts any individual who is an alcoholic or a drug user "whose *current* use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug use, would constitute a direct threat to property or the safety of others." 29 U.S.C. § 706(7)(B). [Emphasis supplied.]

Informants or Undercover Agents

As with other investigative techniques, it is important to review the considerations contained in "Receiving the Complaint," *supra*, to determine if the use of an informant is the preferable technique under the circumstances. If possible criminal activity is involved, it is usually advisable to consider involving the police officials or the district attorney from the beginning. Involvement of the authorities has its advantages and disadvantages.

Suspension With or Without Pay (Administrative Leave)

The first question an administrator must consider before suspending an employee is whether he or she has been delegated the authority to suspend under school district policies and regulations. If the administrator is not sure he or she has that authority, it is vital that the administration obtain the authority by board action or through a board policy or procedure or a negotiated agreement before taking action concerning an employee.

Once a decision to suspend has been made and the authority is established, the administrator should arrange a meeting with the accused employee. Normally it is desirable to include a third person who will maintain the confidentiality of the meeting. If possible, the meeting should take place early in the day near the beginning of the week. This provides the suspended employee an opportunity to have any questions answered during the workday and keeps the school in control of that employee's access to other employees whose recollections or safety might be affected by the suspended employee. Suspensions on Friday afternoons should be avoided. The suspension should be handled with as little fanfare as possible and the employee should not be embarrassed or demeaned.

Although it is not technically required by due process in the view of courts which have considered it, many find it advisable to afford the rudimentary due process procedures outlined in *Loudermill v. Cleveland Board of Education*, 470 U.S. 532 (1985), prior to placing the employee on administrative leave. *Loudermill* provides that an employee is entitled to (1) oral or written notice of the charges against him, (2) an explanation of the employer's evidence, and (3) an opportunity for the accused to present his or her side of the story. The requirements of *Loudermill* can easily be satisfied in the meeting informing the employee of his or her suspension. The employee should also be given a letter outlining the substance of the meeting. Appendix E is a sample of this post-meeting letter. While the employee may be told he or she will be suspended at the meeting, this letter should not be prepared and presented to the employer until after the meeting.

RELATIONSHIP WITH OUTSIDE AGENCIES

The investigation of wrongdoing in the school setting does not occur in a vacuum. School officials should be aware that there are outside agencies which can lend assistance or which must be involved in the investigation. These agencies can include law enforcement agencies such as the local police, the district attorney's office, or other state and federal agencies.

Law Enforcement Agencies

Before the need for investigation arises, school districts should attempt to get an understanding or protocol worked out with local law enforcement officials. This may include city, county, and state law enforcement offices. Also, the district should identify those persons in the school district who will act as the liaison with these agencies and have them establish a relationship with the contact person(s) in each agency. Many school districts establish relationships with police agencies at the individual schools as well as at the central office level.

Other Agencies and Sources of Information

Just as it is important for a school district to establish a liaison with the police, it may also be helpful to establish a similar working relationship with the district attorney, the United States Attorney, the Equal Employment Opportunity Commission, Office for Civil Rights, and other vital governmental agencies. Many of these agencies have independent investigative powers which can be utilized in the more serious cases and may be an invaluable source of information and guidance to school authorities.

In addition to these agencies, there are independent sources of information available to a school district during the investigation of a serious allegation, especially where the work history or credibility of the individual is important. For instance, a district might file a request for information from an agency through the state's open records law. On the federal level, the Freedom of Information Act (5 U.S.C. §§ 552 *et seq.)* provides access to information gathered and maintained by federal agencies. Other sources include the state's Department of Motor Vehicles, which will usually give records of any prior tickets or accidents, the state bureau of investigation, and worker's compensation offices, which can give records indicating whether the employee has worked elsewhere and has filed claims. Also, unemployment records can provide some information on an employee's work history. Generally, the more relevant information an investigator has about someone, the better off he or she is in making a judgment about the employee's credibility during an investigation. Such information can also help determine the appropriate action to take once the investigation is complete.

MAKING THE DECISION

Preliminary Decision

Once the initial investigation is completed, the appropriate administrator must make a preliminary determination of what action to take before a final meeting with the accused. Even if the charges proved groundless, it is imperative that school administrators meet with the accused, review the investigation, and the results. Remember, documenting this can be as important in the situation where the employee is innocent as when he or she is guilty.

In reaching the preliminary decision, there is a checklist of factors which should be considered carefully before proceeding:

- Is the investigation complete, and have the established procedures been followed throughout?
- What are the established, material facts?
- Did the alleged misconduct occur while the employee was on duty, off duty, or at or away from the workplace? If the alleged misconduct did not occur at school or a school-related activity, how is the misconduct related to the school and the employee's job?
- Does "just cause" for discipline exist, and, if so, how can it be described? For example, what behavior standards, rules, policies or laws were broken? What is the evidence and proof supporting a finding that the misconduct occurred?

- How serious was the infraction? Also, how directly and significantly did the misconduct affect the school district and its operations?

- What is the range of penalties or disciplinary actions available? Is progressive discipline applicable or required under the circumstances?

- What is the employee's past record? Is this the first or subsequent occurrence?

- Is there a chance that the misconduct can be remediated, and is the employee entitled to try? [The reasons for either decision should be reasonable and defensible to an arbitrator or judge.]

- What has been the district's disciplinary practice in the past with similar cases? What is the district's philosophy about this kind of case?

- What will be the effect of a decision on other employees? What effect will the decision have on labor peace, and will the decision deter future acts?

- Are there any mitigating circumstances which should influence the decision?

- Has the accused been treated in a manner that the person conducting the investigation would expect to be treated if he or she was in the same or similar situation?

Once these factors have been considered, the administrator is ready to proceed with the final meeting with the accused.

Meeting with the Accused

One frequent mistake school administrators make is to prepare a post-meeting letter to the accused *before* the final meeting. While it is usually helpful to have an outline to follow in the meeting, this final meeting is an opportunity for the accused to explain, discount, or totally discredit any damaging evidence gathered during the investigation. Consequently, the administrator must be open to any explanations by the accused, and any explanation or evidence offered by the accused should be weighed with the other evidence.

Once the final meeting has occurred, the administrator should follow up with a written letter or memorandum. These letters or memoranda generally follow the same format and include five major sections:

- The opening section should explain the nature and substance of the charges and describe with some specificity the evidence supporting the enumerated charges.

- The second section should relate how the employee responded to the charges throughout the investigation and in the final meeting.

- The following section should state that based upon the investigation, the evidence obtained, and the response of the employee, the following conclusions have been reached. The section should then set out separately the various conclusions reached and the decision.

- The fourth section basically answers the question, "What happens now?" One possibility is that the employee will be proposed for discharge. The basis for such action should be explained, *i.e.,* serious misconduct, progressive discipline not applicable to such a serious infraction, second, or third such incident, etc. If the employee is to be retained, but his or her behavior contributed to the problem, it is advisable that appropriate directives be given in the memoranda. For example, a male teacher should be instructed that his decision to drive two female students in his car was an exercise of poor judgment and that he should not do it again. The teacher should then be instructed to never replicate such behavior unless a female teacher accompanies him and the female students. A subsequent violation of such a specific directive can provide an independent basis for discipline or discharge based upon failure to follow directives.

- The final section should instruct the employee that if everything stated in the letter is not clear, the employee should contact the administrator in writing within a time certain. It is vitally important that "closure" be achieved, that is, that both parties completely understand the results of the investigation, the position of the parties, and any directives given. Closure is greatly facilitated by the careful drafting of a detailed post-meeting letter.[13] Appendix G is a sample post-meeting letter where wrongdoing was found, a determination made not to proceed with termination, but giving directives concerning future behavior. Appendix G can be adapted to advise the employee that a recommendation for termination will be made. Appendix H is a post-meeting memorandum citing a lack of evidence of wrongdoing.

As a side note to the post-closing letter, it is important that the administrator document receipt of the letter by the employee. This can be accomplished through hand delivery with the employee signing a duplicate or through certified mail. Normally, it is desirable to hand deliver the memorandum because that adds a personal touch and shows an interest and concern. If the employee refuses to acknowledge receipt of the letter, one can simply have an independent third party sign that the employee received a copy with a note made of the date and time.

Confessions

Once an investigation is under way or is imminent, some suspected employees will give in to the pressure and confess. A confession makes an investigator's job easier, but it does not necessarily end the inquiry. A confession must be able to withstand attempts by the employee to recant and sustain subsequent attacks in dismissal proceedings or possibly in court.

THE ROLE OF THE EMPLOYEE REPRESENTATIVE

The question of whether the employee should have a representative present at any time during the investigation, and, if so, when and what should be his or her role is present in each investigation. State laws, state court decisions, board policies, and collective bargaining agreements are the best sources for an answer. Unlike the rights of an accused in a criminal setting, the presence of a representative in the school's investigatory process is not required by the United States Constitution or federal laws.[14]

MEDIA RELATIONS

Contact with the media, especially regarding employee misconduct, has the potential of making a bad situation worse. Inquiry by the media should be anticipated and planned to prevent the making of inappropriate statements by a school official. The following are a few simple guidelines which should be considered:

- Answer all questions honestly. The obligation, however, is to be truthful, not to tell everything one knows. Avoid saying "no comment" because this answer gives the impression that one has something to hide or it can give the appearance of affirming a question.

- When the investigation centers on the allegation of a child and children are involved in responding to the media, school officials must be sensitive to not releasing or speaking from student records in violation of the Family Educational Rights and Privacy Act (FERPA).

- One must make certain to fully understand the question asked before attempting to respond. If one does not understand the question, clarification should be requested.

- One should answer the reporter's questions as fully as possible, however, this does not necessarily mean that one should volunteer more than is re-

quested. It helps to ask questions of the reporter to make certain he or she understands the answer.

- If one does not know the answer to a reporter's question, the reporter should be told that it will be necessary to check with others to determine the answer and that the reporter will be contacted to be given the answer. Any promised follow-up must be fulfilled.

- One must assume that everything said to a reporter is on the record and can be used in an article or news story.

- Phone calls from reporters should be returned even if the response to questions will be that nothing can be said on the subject.

- One must always give the same answer (unless circumstances have changed) to different reporters. If circumstances have changed, one should consider contacting the reporter to whom one spoke earlier and give that reporter the updated information.

- One should anticipate an interview and prepare for it. Review the facts and background materials and determine how one will answer sensitive questions. It is sometimes helpful to prepare a paragraph response to anticipated questions in advance of the interview.

- One should always attempt to respond with short, direct answers.

- One should never speculate or go beyond the facts known. Do not fall into the trap of "what if" questions because those are not fair inquiries.

- Be proactive. Many times school officials can take negative implications and speculation out of the story by initiating the information release to the press themselves.

CONCLUSION

The application of legal standards in schools reflects the school's unique position in our society and the mission of educating young people. So long as the investigation of alleged wrongdoing by employees is school-related as compared to investigations seeking evidence of criminal wrongdoing, the relaxed standards of reasonable cause are applicable. While investigations of alleged wrongdoing by employees is not limited by the restrictions of criminal laws, the investigation should be conducted in a manner which allows any wrong to be detected but protects the interests of the accused.

A variety of techniques can be used to conduct investigations, and most of them have been discussed in this paper. Some of the techniques may not be available in certain states or districts because of state laws or district policies. Likewise, one technique will not necessarily satisfy the needs of an investigation while combining that technique with one or more others may be just what is needed to achieve the result. The suggestions on how to utilize each of these techniques are made in the context of securing a resolution to the allegation while protecting the interest of the accused. While there is no magic in some of the suggestions such as when, where, and how to hold a meeting, experience has shown that these techniques work more often than not to achieve the overall objective. Every situation has its unique aspects, however, so different responses may be called for to resolve each problem.

Successful investigations begin with planning and end with a result. In between these two points, considerable leadership and skill must be applied. Although a supervisor, lawyer, or central office person may actually coordinate the investigation, the active participation of the employee's immediate supervisor is important to a successful investigation. Without the immediate supervisor assuming leadership responsibility, the task then falls to others who are less familiar with the players and do not have responsibility for their daily supervision. Investigators should always treat people with whom they come into contact in the same manner that they would expect to be treated by representatives of government. Care must be exercised to avoid trampling on the dignity of an accused. By doing so, the objective of the investigation should be obtainable and the school will continue to function after the investigation is history.

END NOTES

1. Title 42 U.S.C. § 1983 provides as follows:

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

2. *O'Connor v. Ortega,* 107 S. Ct. 1492, 1501-02 (1987):

   Even when employers conduct an investigation, they have an interest substantially different from "the normal need for law enforcement." [Citation omitted.] Public employers have an interest in ensuring that their agencies operate in an effective and efficient manner, and the work of these agencies inevitably suffers from the inefficiency, incompetence, mismanagement or other work-related misfeasance of its employees. Indeed, in many cases, public employees are entrusted with tremendous responsibility, and the consequences of their misconduct or incompetence to both the agency and the public interest can be severe. *In contrast to law enforcement officials, therefore, public employers are not enforcers of the criminal law; instead, public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner. [Emphasis added.]*

3. *Baxter v. Palmigiano,* 425 U.S. 308 (1976). As to the privilege against self-incrimination, the constitutional protection prohibits a person from being compelled *"in any criminal case"* to be a witness against himself. U.S. Const. Amend. V. Although the Fifth Amendment privilege has been found over the years to apply in a variety of formal proceedings beyond merely a criminal trial, *see e.g., Early v. People,* 142 Colo. 462, 352 P.2d 112, 117, *cert. denied,* 364 U.S. 847 (1960), it has not been extended to encompass the making of self-incriminating statements which merely impact one's employment situation.

4. *See United States v.Kordel,* 397 U.S. 1 (1970); *Arthurs v. Stern,* 560 F.2d 477 (1st Cir. 1977), *cert. denied,* 434 U.S. 1034 (1978); *Peiffer v. Lebanon School Dist.,* 848 F.2d 44 (3rd Cir. 1988) (There is no due process right to stay a disciplinary or termination hearing until after the criminal trial and no privilege to withhold testimony from the school board.); *Rosenberg v. B'd of Education of School District #1,* 710 P.2d 1095 (Colo. 1985).

5. *See e.g.,* Tex. Civ. Stat. Ann., Art. 6252-16 (also known as the ("Texas Whistle-blowers Act")); C.R.S. §§ 24-14-101 *et seq.* (Colorado Law).

6. *See e.g.,* Elkouri and Elkouri, How Arbitration Works, 617 (1984), and *Sanders v. U.S. Postal Service,* 801 F.2d 1328, 1330 (D.C. Cir. 1986). "A nexus between the conduct and the efficiency of the service may be presumed where the conduct is egregious and has an obvious adverse effect on the efficiency of the service. This is true even where the conduct is off duty."

7. Failure of the school district to follow its own procedures may, of itself, be violative of the employee's due process rights. Ordinarily, however, only where disregard of rules results in a procedure which in itself impinges upon due process rights does a justiciable cause of action arise. The procedural error must impinge upon an individual's property or liberty right to constitute a violation of due process. *See Atencio v. B'd of Educ.,* 658 F.2d 774 (10th Cir. 1981); *U.S. v. Cacares,* 440 U.S. 741, 99 S. Ct. 1465 (1979); *Levitt v. UTEP,* 759 F.2d 1224 (5th Cir. 1985). Failure to follow procedures in connection with nonrenewals seldom results in a denial of due process justifying reversal of the board's decision. *See e.g., Roberts v. Lincoln County School Dist. No. 1,* 676 P.2d 577 (Wyo. 1984); *Smith v. School Dist. No. 45,* 666 P.2d 1345 (Or. App. 1983); *Schaub v. Chamberlain B'd of Educ.,* 339 N.W.2d 307 (S.D. 1983). Terminations, however, require "substantial compliance" with procedures to be effective. *See Piacitelli v. Southern Utah State College,* 636 P.2d 1063 (Utah 1981); *Gee v. Alabama State Tenure Comm'n,* 419 So.2d 227 (Ala. Cir. App. 1982). Failure to comply with time requirements is usually not fatal to the board's ability to dismiss. *See e.g., Compton Coll. Fed. of Teachers v. Compton Community Coll. Dist.,* 166 Cal. Rptr. 595 (Cal. App. 1980) (thirty-day determination period was directory, not mandatory); *Davis v. Barr,* 646 S.W.2d 914 (Tenn. 1983) (failure to give notice of findings within ten days merely tolled time for appeal); *State ex rel. Webb v. B'd of Educ. of Bryan City SchoolDist.,* 460 N.E.2d 1121 (Ohio 1984) (failure to hold hearing within thirty days did not preclude dismissal). Failure to substantially follow evaluation procedures is more difficult to overcome. *Cf. Lipan v. B'd of*

Educ., County of Hancock, 295 S.E.2d 44 (W. Va. 1982) (failure to comply with state mandated evaluation policy prevented discharge) with *Wood v. Indep. School Dist. No. 141,* 661 P.2d 892 (Okla. 1983) (strict compliance with evaluation procedures not required). The failure of administrators to follow evaluation procedures may not be a problem where the final authority is with the board. *Board of Trustees of Commun. Dist. No. 513 v. Krizek,* 446 N.E.2d 941 (Ill. App. 1983).

8. *See e.g., Continental Airlines, Inc. v. Keenan,* 731 P.2d 708 (Colo. 1987).

9. In drug and alcohol abuse cases, for example, professionals in treatment programs may provide great assistance, both in alerting the investigator to the common, identifiable reactions or symptoms of an involved employee and to assist in the interview itself.

10. Numerous court decisions, including ones issued by the United States Supreme Court and the Fifth Circuit, form the legal basis for the use of sworn affidavits in investigation of alleged wrongdoing. The United States Supreme Court has held that, given adequate immunity, the state may insist that employees either answer questions under oath about the performance of their job or suffer loss of employment. *Lefkowitz v. Turley,* 414 U.S. 70, 94 S. Ct. 316 (1973). Public employees may constitutionally be discharged for refusing to answer even potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity. *Lefkowitz v. Cunningham,* 431 U.S. 801 (1977); *Gardner v. Broderick,* 392 U.S. 273 (1968); *Gulden v. McCorkle,* 680 F.2d 1070 (5th Cir. 1982), *reh'g denied,* 685 F.2d 157 (5th Cir. 1982), *cert. denied,* 459 U.S. 1206 (1983); *see also DeLurg v. Kretchmer,* 322 N.Y.S.2d 517, 519 (Sup. Ct. 1971), "A public employee, who is suspected of violating the public trust, cannot remain both silent and immune from disciplinary action or dismissal." Such questions may be asked of the employee so long as the questions are specifically, directly, and narrowly related to the performance of the individual in his or her duties. *Gardner, supra; Uniformed Sanitation Men Assoc. v. Commissioner of Sanitation of the City of New York,* 392 U.S. 280 (1968). Public employees in a limited and ever-decreasing number of states may be asked to submit to a polygraph examination as part of an investigation of alleged wrongdoing. *See e.g., Hester v. City of Milledgeville,* 777 F.2d 1492 (11th Cir. 1985); and discussion *infra.*

11. As of 1986, the following states prohibited the use of polygraphs by private employers as a condition of employment or continued employment: Alaska, Connecticut, Delaware, Hawaii, Idaho, Iowa, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Washington, West Virginia, Wisconsin, and the District of Columbia. The following states regulate the competence of polygraph examiners and the administration of the exam: Alabama, Arkansas, California, Florida, Indiana, Kentucky, Louisiana, Michigan, Mississippi, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Vermont. The following states license examiners and limit the areas of inquiry: Arizona, Georgia, Illinois, Nevada, New Mexico, and Tennessee.

12. Those states include Colorado, Kansas, Missouri, New Hampshire, Ohio, and Wyoming.

13. For a complete review of the practical aspects of evaluating employee performance and the results of investigations, *see* K. Frels & J. Horton, *A Documentation System for Teacher Improvement or Termination,* Monograph, National Organization on Legal Problems of Education, Rev. Ed. 1988.

14. Two United States Supreme Court cases in 1975 interpreted a provision of the National Labor Relations Act to provide an employee with the right to representation in investigatory interviews. *NLRB v. Weingarten, Inc.,* 420 U.S. 251 (1975); *International Ladies' Garment Workers' Union v. Quality Manufacturing Co.,* 420 U.S. 276 (1975). Even though the Act does not apply to public school districts, the decisions give insight. The Court concluded that an employee must request the representation and also reasonably believe that the investigation will result in disciplinary action. Within the investigatory interview context, the Court was concerned that "[a] single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." *Weingarten* at 262-63. *Compare Slaughter v. National Labor Relations Board,* 876 F.2d 11 (3rd Cir. 1989), holding that a nonunion employee was not entitled to have a fellow employee of his choice present at a meeting with his supervisor. On remand, the NLRB concluded that *Weingarten* should not be extended to nonunion situations.

APPENDIX A

File: KL

PUBLIC COMPLAINTS (Sample Policy)

The Board of Education intends to foster a close working relationship between the School District and its employees and patrons by providing a fair, orderly, and timely process for handling concerns and complaints concerning the operation of the schools. This policy shall apply to all public complaints except those included in Policy KLB, PUBLIC COMPLAINTS ABOUT THE CURRICULUM OR INSTRUCTIONAL MATERIALS OR STRATEGIES.

The Board of Education relies on its teachers and administrators to resolve concerns of patrons. It is the policy of the Board to provide for such resolution at the level most directly involved first and in an informal manner if possible. If such resolution cannot be accomplished, however, procedures shall be made available for review at the highest administrative level with an opportunity to make a presentation to the Board of Education.

Complaints shall be resolved consistent with policy and regulation and other standards of good educational practice adhered to by the School District.

File: KL

PUBLIC COMPLAINTS (Sample Policy)

Constructive criticism of the schools is welcomed whenever it is motivated by a sincere desire to improve the quality of the educational or management program of the District. The Board of Education, however, has confidence in its professional staff and desires to support their actions in order that they be free from unnecessary, spiteful, or destructive criticism and complaint. Therefore, whenever a complaint is made directly to the Board as a whole or to a Board member as an individual, it will be referred to the school administration for study and reporting.

The Board of Education expects that the administration will develop procedures for receiving complaints courteously, and that it will take steps to make a proper and timely response to the complainant.

The Board of Education considers citizen complaints which cannot be resolved by the administration or when citizens are appealing an administrative decision.

CROSS REFS: KD, Public Participation at Board Meetings
KDA, Correspondence from the Public

File: KL-R

PUBLIC COMPLAINTS (Sample Review Procedures)

The following procedures shall apply in handling complaints under Policy KL.

Levels of Review

Consistent with the policies of resolution at the level most directly involved and of providing opportunities to appeal such decisions to higher administrative levels, complaints shall proceed through the following levels of review:

- Building or Department Level personnel

  a. Teacher or other District employee ("employee")

  b. Principal or immediate supervisor ("supervisor")

- Central Administration (director, executive director, assistant superintendent)

- Superintendent of Schools or designee

- Board of Education

Building or Department Level Review

Patrons should initiate complaints by contacting the person at the Building or Department Level who is the most direct subject of the complaint. If the complaint concerns a teacher, that teacher would be the initial level. If the complaint concerns a school, the principal would be the appropriate contact.

Review at the initial level is informal and should follow a discussion format. The complaint itself may be oral or in writing. The District employee receiving the complaint shall provide a response within three (3) working days after the discussion. If the patron is dissatisfied by the response of the employee, he/she may bring the matter before the supervisor for further discussion in accordance with this section.

Central Administration Level

Any patron who is dissatisfied with the resolution of his/her complaint by the supervisor at the Building or Department Level may appeal that decision to the Central Administration Level. Such appeal shall be in writing, directed to the supervising central office administrator, and shall specify the nature of the complaint, the supervisor's decision, and the reasons for the appeal. An appeal must be submitted within ten (10) working days after the supervisor's decision.

Upon receipt of an appeal, the administrator shall notify the supervisor and request a written statement of his/her decision within three (3) working days. A copy of that statement shall be provided to the patron. The administrator shall schedule a hearing with the patron, at which time the patron may appear and make statements and produce evidence in his/her support. At such hearing the patron may be accompanied by an attorney or other advisor, provided that the patron identify the attorney or advisor to the administrator at least three (3) working days before the hearing. The administrator may establish time requirements and other procedures in connection with the hearing as necessary.

Following the hearing, the administrator shall make findings and submit a written decision. The decision shall be provided to the patron within ten (10) working days of the hearing, unless additional time is needed.

Superintendent of Schools

A patron who is dissatisfied with the decision of the central office administrator may appeal to the Superintendent (or designee). Such appeal shall be in writing and shall include a statement of the complaint, the decisions of the central office administrator and the supervisor, and a statement of the reasons for the appeal. This appeal must be submitted within ten (10) working days after receipt of the decision of the central office administrator.

The Superintendent (or designee) shall review the prior decisions and any records from prior hearings and, at his/her discretion, may convene another hearing or otherwise permit the patron or the District to present further evidence or argument. Within ten (10) working days after completion of this process, the Superintendent (or designee) shall render a written decision and provide a copy to the patron. This decision shall be final unless the Board of Education accepts the matter for review.

Board of Education

If the patron is dissatisfied with the decision of the Superintendent of Schools, he/she may appeal to the Board of Education. Such appeal shall be directed in writing to the Secretary of the Board and the Superintendent and shall include at least all prior decisions and a statement of the complaint and reasons for the appeal. The Board shall have the discretion to accept or reject the matter for review. If it rejects the matter, the Superintendent's decision shall be final. If it accepts the matter, the Board shall schedule a meeting at which it will consider the appeal. At such meeting, the Board may hear argument from the parties, review the prior decisions and evidence, and make such inquiry as it deems necessary. The Board shall render a written decision within ten (10) working days after this meeting unless additional time is needed. The Board's decision shall be final.

CONCERNS POLICY

Occasionally an employee will have a concern or a problem which is not within the definition of a grievance. For the most part, these concerns are of an administrative nature which can be resolved through an informal process without the involvement of the Board. Concerns which fall within these specific areas may be brought to the administration's attention through the concern process. These concerns include, but are not limited to:

- Concerns which do not fall within the grievance policy's definition of a grievance,
- Employee performance evaluations or reviews, and
- The nonrenewal of any employment contract.

Employee concerns of the nature described above must first be presented to the employee's immediate supervisor. If the matter is not resolved to the employee's satisfaction by the immediate supervisor, the employee may discuss the matter with the appropriate successive administrators until the employee has been satisfied or after the Superintendent or his or her designee has met with the employee. Employee concerns which are presented through this informal process shall terminate with the Superintendent, with no direct appeal to the Board. However, employees who continue to have an unresolved concern may appear before the Board under the policy for hearing of citizens. The hearing of citizens policy is available to both employees and patrons of the District to express concerns about the District by making a presentation to the Board.

APPENDIX B

COMPLAINT FORM

Person filing this complaint: _____

Position/school: _____

Telephone: _____

Statement involves complaint against whom: _____

Please describe in detail the events surrounding the complaint against the above-named person. Please include dates, time, locations, persons present, substance of statements, and conversations, etc. Please be as factual as possible. If you must express an opinion, please make it clear that you are doing so:

(multiple pages if necessary)

Note: When you are finished, please reread your statement in its entirety. Make any necessary changes and initial those changes. Then initial each sheet in the top lefthand corner. Sign and date below.

I affirm that the above statement is the truth to the best of my knowledge.

_____	_____
Signature Date	Signature Date
Person making statement	Person receiving statement

APPENDIX C

AFFIDAVIT*

*This Affidavit has been designed to seek information about the alleged theft of school property and services. This Affidavit should be administered only after consultation with an attorney.

STATE OF _____)
) ss:
COUNTY OF _____)

_____, being first duly sworn upon oath, based on his/her personal knowledge, answers the following questions as noted in his/her handwriting on these and the attached _____ pages,which were propounded by duly authorized officials of the_____ School District ("School District") concerning actaiviteis associated with his/her employment:

1. What is your name?
2. What is your current position of employment with the School District?
3. Have you been advised by an official of the School District, and do you understand that you are required to answer the questions contained in this affidavit as a condition of your employment, and if you fail or refuse to answer the questions contained in this affidavit that your employment may be terminated?
4. Do you understand that giving a false or otherwise untrue answer to any of these questions in this affidavit could result in a criminal charge of perjury being brought against you and that such failure to give a truthful answer to a question in this affidavit could also result in the termination of your employment?
5. Have you been advised by an official of the School District, and do you understand that this affidavit will not be used against you as evidence by the School District in any attempted criminal prosecution except for a charge of perjury which might arise from the answering of these questions and the execution of this affidavit?
6. Do you understand that when a question in this affidavit asks if you have knowledge of or if you know of an instance or situation, it means that you are expected to relate any knowledge you may have about the incident, whether it be personal knowledge or information received from other people, and to relate the source of your knowledge or information?
7. How long have you been in your current job position?
8. What are your specific responsibilities in your current position?
9. Have you ever taken any school supplies or materials owned by the school and used them personally? If so, what were the circumstances (including the supplies or materials taken)?
10. Have you ever taken any school supplies or materials owned by the school to your home for your personal use? If so, what were the circumstances (including the supplies or materials taken)?
11. Have you ever had anyone take any school supplies or materials owned by the school to your house? If so, what were the circumstances (including the supplies or materials taken)?
12. Have you ever allowed any students or other employees to take school supplies or materials to their homes for their personal use? If so, what were the circumstances (including the supplies or materials taken)?

13. Have you ever yourself taken any school supplies or materials owned by the school home for any purpose whatsoever? If so, state the circumstances (including the supplies or materials taken) and the purpose.
14. Have you ever had anyone take any school supplies or materials owned by the school to your house for any purpose whatsoever? If so, state the circumstances (including the supplies or materials taken) and the purpose.
15. Have you ever allowed any students or other employee to take any school supplies or materials to their homes for any purpose whatsoever? If so, state the circumstances (including the supplies or materials taken) and the purpose.
16. Do you have any knowledge of any students or employees taking school supplies or materials home for any purpose whatsoever? If so, relate what was taken, who took the supplies or materials, the date or approximate date on which they took the materials, how you acquired your knowledge and whether you know if they returned those materials to the school.
17. Have you ever sold or traded for anything of value any school supplies or materials owned by the school to any person whatsoever? If so, relate the circumstances of the sale or trade (including the supplies or materials traded or sold).
18. Have you ever solicited, accepted, or agreed to accept any benefit, item of value, service, or gift from any vendor or potential vendor of the School District? If the answer is yes, state, in detail, the nature of the benefit, item of value, service, or gift; the vendor or potential vendor it was received from; and the dates when received.
19. Do you know of any former or current School District employees who have solicited, accepted, or agreed to accept any benefit, item of value, service, or gift from any vendor or potential vendor of the School District? If the answer is yes, explain, in detail, including the name of the employee or former employee who did it and the vendor or potential vendor involved.

(Employee Name)

Subscribed and sworn to before me this _____ day of _____, 19__ .

Witness my hand and official seal.
My commission expires: _____.

(SEAL)

_____
Notary Public

APPENDIX D

STAFF HEALTH AND SAFETY PROCEDURES

Procedures for Testing for the Presence of
Drugs, Alcohol, or Controlled Substances

These regulations are promulgated by the Board of Education toward the end of creating a drug-free school environment. Enhanced productivity, employee safety, and decreased health and accident costs are the intended products of this policy. Moreover, because School District employees supervise and act as role models for the students of this District, these regulations are also intended to promote and protect student health and safety.

The Superintendent or designee may require an employee to undergo a blood or urinalysis test to determine the presence of alcohol, drugs, or controlled substances in an employee's system under the following circumstances:

1. When such test is administered in connection with a required pre-employment physical;
2. When such test is performed in connection with routine required periodic physicals;
3. When such test is supported by a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience, that the employee has been under the influence of drugs, controlled substances, or alcohol on school property or during the workday.

The employee shall submit to an examination under these circumstances, and a refusal to submit shall constitute insubordination and may result in disciplinary action consistent with Board policies and applicable law. The results of such examinations shall be released directly to the District by the physician or other person conducting the examination. The District will pay the cost of the examination.

The test will be administered by a person of the District's choice ("testing facility"), which person shall be qualified to perform the examination using testing methods that are technologically current and procedures that are legally adequate. These procedures will provide for the following:

1. Proper collection and storage of the sample and documentation of the chain of custody of a sample;
2. Application of the same or an alternative testing method to confirm results that show "positive" initially; and
3. The preservation of a specimen sample by the testing facility for use by the employee.

When a positive test is utilized by the District as a basis for disciplinary action, due process procedures required by District policies and state and federal law shall apply and the employee shall be given an opportunity to rebut or explain the results of the test.

Test results and other personally identifiable medical information received by the District as a result of the application of this procedure shall be treated as confidential and will only be disclosed in connection with and as required by the procedures and proceedings contemplated by this regulation.

APPENDIX E

SAMPLE LETTER OF SUSPENSION (ADMINISTRATIVE LEAVE)

Date

HAND-DELIVERY

Mr. Terry Teacher
100 South Street
Ourtown, U.S.A.

Dear Terry:

This letter is provided as a follow-up to our conference today and will confirm various things we discussed at that time. The purpose of our meeting was to preliminarily review the facts and nature of allegations which have been made concerning alleged improper sexual conduct by you with various students. We reviewed with you the information we currently have and provided you with an opportunity to respond to the allegations.

Based upon the nature of the charges, we believe it to be in your best interests and those of the School District that you be temporarily relieved of your teaching duties until a thorough investigation can be completed and a decision reached as to how the matter will be resolved. Therefore, this will confirm that you will be on administrative leave with full pay and benefits as of today, until further notice. Placing you on administrative leave is not any determination of guilt or wrongdoing.

During the period of administrative leave, you will not be able to participate in District activities, and you are not to return to the School, whether during working hours or after, unless prior arrangements have been made with Mr. Peter Principal. Your contacts during this period should be with or through Mr. Principal. If you have any questions, please call him. He may require that you check with him periodically by telephone. If you have not already done so, you should arrange with him to obtain your personal belongings and turn over District property currently in your possession by _____, 19__ . This will be scheduled after school hours.

Unless you receive notice from Mr. Principal to the contrary, we have scheduled a meeting with you to be held _____, 19__ , to review the status of the investigation and to advise you of any recommendations or decisions made. You may have a representative present with you at that time. Should there be any inquiries by others of you concerning this matter or the investigation, you may refer them to me, the School District's attorney, or to your own personal representative.

If you have any questions concerning your status, your responsibilities, or the District's expectations during this period, please contact me or Mr. Principal by _____, 19 __, for clarification.

Sincerely,

Superintendent of Schools

APPENDIX F

INVENTORY OF PROPERTY REMOVED*

The following items were removed from the _____ Independent School District facilities located at _____ (address) by_____ (name of employee) at _____ (date and time). The items were removed at the direction of _____ (name), and the removal was verified by _____(name of person present).

	No. of Items	Item Description
1.		
2.		
3.		
4.		
5.		
6.		
7.		

The above information is correctly recorded, and I acknowledge that I received custody of the property. This property belongs to me, and I am entitled to have it in my possession.

/s/ _____
Person witnessing removal

/s/ _____
Employee

*A similar inventory can be prepared for school property returned by the employee.

APPENDIX G

SAMPLE MEMORANDUM

FINDING OF WRONGDOING AND DIRECTIVE

TO: Terry Teacher

FROM: Paul Principal

DATE: January 31, 1987

RE: Allegation of Wrongdoing Made by Sara Schoolmarm

This memorandum contains my findings concerning my investigation of the allegations made against you by Sara Schoolmarm. Ms. Schoolmarm accused you of harassment and intimidation in your actions toward her. The reason advanced by Ms. Schoolmarm for your actions is apparently based on the apparent rejection of sexual advances you made toward Ms. Schoolmarm. After meeting with you on January 3, 1987, to discuss the complaint with you, I spoke with two teachers who corroborated the story of Ms. Schoolmarm -- Winning Coach and Caring Counselor. My investigation has indicated that you did in fact make sexual advances to Ms. Schoolmarm and that after being told they were unwelcome, you continued to make sexual advances. This behavior on your part is unacceptable and in violation of Policy XES.

You are directed to refrain from any further intimidation or harassment of Ms. Schoolmarm. Furthermore, you are directed not to make any sexual advances toward Ms. Schoolmarm or any other employee or student while performing your duties at school. A copy of this reprimand and directive will be placed in your personnel file. If you violate this directive, I will have no choice but to recommend to the Superintendent that your employment with the District be terminated immediately.

If you have any questions concerning my findings or these directives, or if you disagree with the facts or conclusions stated in this memorandum, please advise me in writing no later than _____(date), so we can meet and work out any remaining differences.

/s/

Paul PrincIpal

I have received a copy of this memorandum. I understand that my signature does not necessarily constitute agreement with its contents, and that I have the opportunity to respond if I am in disagreement.

/s/

Terry Teacher _____ Date

cc: Personnel File

APPENDIX H

SAMPLE MEMORANDUM
NO WRONGDOING FOUND

TO: Terry Teacher

FROM: Paul Principal

DATE: January 31, 1987

RE: Allegation of Wrongdoing Made by Sara Schoolmarm

This memorandum addresses the allegations of wrongdoing asserted against you by Sara Schoolmarm. Specifically, Ms. Schoolmarm alleges that she has been the subject of harassment and intimidation by you at school during recent weeks. This harassment and intimidation, according to Ms. Schoolmarm, arose from her rejection of alleged sexual advances made toward her by you. I have conducted an investigation of these allegations, and have found no witnesses to corroborate Ms. Schoolmarm's story. Since I do not know which of you to believe, I am closing this matter for lack of evidence.

Although I have not found that you engaged in the wrongdoing as alleged by Ms. Schoolmarm, I have a suggestion for your future dealings with Ms. Schoolmarm. I feel that to the extent possible, you should avoid contact with Ms. Schoolmarm while at school in order to diminish the chances of such allegations arising again in the future.

If you have any questions concerning my findings or these directives, or if you disagree with the facts or conclusions stated in this memorandum, please advise me in writing no later than _____(date), so we can meet and work out any remaining differences.

/s/

_____

Paul Principal

I have received a copy of this memorandum. I understand that my signature does not necessarily constitute agreement with its contents, and that I have the opportunity to respond if I am in disagreement.

/s/

_____ _____

Terry Teacher Date

EFFECT OF SECTION 89 REPEAL AND REINSTATEMENT OF PRIOR LAW: A BRIEF OVERVIEW

Katharine L. Herber
National School Boards Association
Alexandria, VA

BACKGROUND

On November 7, 1989, Congress passed a bill to repeal section 89 and reinstate modified pre-Tax Reform Act of 1986 nondiscrimination and qualification rules which apply to self-insured medical reimbursement (sec. 105[h]), group term life insurance (sec. 79), dependent child care (sec. 129), and cafeteria plans (sec. 125). The new law did not repeal or alter recordkeeping and reporting requirements (sec. 6039D) that apply to specified fringe benefit plans, or penalties for failure to file information returns (sec. 6652).

SELF-INSURED MEDICAL EXPENSE REIMBURSEMENT PLANS (SEC. 105[h])

Self-Insured Medical Reimbursement Plan - General Definition (reg. sec. 1.105-11[b][1][i])

A self-insured medical expense reimbursement plan is a separate written plan for the benefit of employees which provides for reimbursement of employee medical expenses. A plan is self-insured unless reimbursement is provided under (1) an individual or group policy of accident or health insurance issued by a licensed insurance company or (2) a prepaid health care plan regulated under federal or state law in a manner similar to the regulation of insurance companies (e.g., HMO).

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General Definition Clarified With Respect to Certain Plans and Reimbursements.

Shifting of Risk (reg. sec. 1.105-11[b][1][ii])

A plan underwritten by a policy of insurance or a prepaid health care plan that does not involve the shifting of risk to an unrelated third party is considered self-insured.

Captive Insurance Company (reg. sec. 1.105-11[b][1][iii])

A plan underwritten by a policy of insurance issued by a captive insurance company is not considered self-insured if 1) for the plan year the premiums paid by companies unrelated to the captive insurance company equal or exceed 50 percent of the total premiums received and 2) the policy of insurance is similar to policies sold to such unrelated companies.

Partial Reimbursements (reg. sec. 1.105-11[b][2])

The section 105(h) rules apply only to the self-insured portion of an employer's written medical plan or arrangement even if the plan is in part underwritten by insurance.

Income Exclusion (sec. 105[b] and sec. 105[h])

Amounts received by an employee through accident or health insurance are excluded from gross income if the amounts are paid to the taxpayer to reimburse the taxpayer for expenses incurred by him for the medical care of the taxpayer, his spouse, and his dependents (sec.

105[b]). In the case of a highly compensated employee, the income exclusion does not apply to the excess benefits reimbursement paid under a discriminatory self-insured medical reimbursement plan (sec. 105[h]).

Nondiscrimination Testing Requirements

In order to qualify for special tax treatment under section 105(h), a self-insured medical reimbursement plan may not discriminate in favor of highly compensated employees with respect to both eligibility to participate and benefits provided under the plan.

Highly Compensated Employees (sec. 105[h][5] and reg. sec. 1.105-11[d])

For the purpose of both the eligibility and benefits tests, a highly compensated employee is any nonexcludable individual who is 1) one of the 5 highest paid officers, 2) among the highest paid 25 percent of all employees (including the 5 highest paid officers) rounded to the next highest number, or 3) a shareholder who owns more than 10 percent in value of the employer's stock.

Employees Excluded From Testing (sec. 105[h][3] and reg. sec. 1.105-11[c][2][III][A]

For the purpose of conducting both the eligibility and benefits tests, an employer may exclude the following individuals:

Employees who have not completed 3 years of service;

Employees who are under age 25;

Part-time and Seasonal Employees;

In General (reg. sec. 1.105-11[c][2][iii][C]). Any employee whose customary weekly employment is less than 25 hours, or any employee whose customary annual employment is less than 7 months, may be considered as a part-time or seasonal employee.

Special Rule For Part-Time Employees (reg. sec. 1.105-11[c][2][iii][C]). Part-time employees whose customary weekly employment is less than 35 hours may be excluded from testing if 1) other employees in similar work with the same employer or 2) no employees of the employer are in similar work in the same industry and location have substantially more hours.

Special Rule For Seasonal Employees (reg. sec. 1.105-11[c][2][iii][C]. Seasonal employees whose customary annual employment is less than 9 months may be excluded from testing if 1) other employees in similar work with the same employer or 2) no employees of the employer are in similar work in the same industry and location have substantially more months.

Nonresident aliens who receive no U.S. source income.

Employees included in a collective bargaining agreement if accident and health benefits were the subject of good faith bargaining between the employee representative and employer.

Eligibility Test (sec. 105[h][3] and reg. sec. 105-11[c][2])

A plan satisfies the eligibility test if it passes **at least one** of the percentage tests, or the classification test.

Percentage Tests (sec. 105[h][3][A][i] and reg. sec. 1.105-11[c][2][i][A] and [B])

70 Percent Test. At least 70 percent or more of all nonexcludable employees actually participate in the plan.

70 Percent/80 Percent Test. At least 70 percent or more of all nonexcludable employees are eligible to participate in the plan and at least 80 percent or more of those eligible actually participate in the plan.

Classification Test (sec. 105[h][3][A][ii] and reg. sec 1.105-11[c][2][ii])

Under the reinstated regulations, the classification test was satisfied if the plan was of-

fered to a fair cross section of all employees found by the Internal Revenue Service not to be discriminatory in favor of highly compensated individuals applying the same standards as are applied under section 410(b)(1)(B). However, regulations proposed to be effective for plan years commencing after December 31, 1988 would make substantial changes to the reasonable classification test based upon "safe" and "unsafe" harbors (proposed regulation section 1.410(b)-4, I.R.B. 1989-27).

Treatment of H.M.O. Participants (reg. sec. 1.105-11[[c][4][iii])

For the purposes of the eligibility test, a self-insured plan will be deemed to benefit an employee who has enrolled in a health maintenance organization (HMO) that is offered on an optional basis by the employer in lieu of coverage under a self-insured plan if, with respect to that employee if 1) the employer's contributions to the HMO plan equal (or exceed) those that would be made to the self-insured plan and 2) the HMO plan is designated with the self-insured plan as a single plan under the rule applicable to combined plans (see discussion of Multiple Plans herein below) For purposes of section 105[h], employees covered by, and benefits under, the HMO plan are not treated as part of the self-insured plan.

Benefits Test (sec. 105[h][4] and reg. sec. 1.105-11[c][3]

Under the benefits test, a self-insured medical reimbursement plan will be considered discriminatory unless all benefits provided for participants who are highly compensated individuals are provided for all other participants.

In General (reg. sec. 1.105-11[c][3][i])

Benefits Subject to the Test. In general, all benefits subject to reimbursement under the plan must pass the benefits test.

• Certain Benefits Exempt From Testing (reg. sec. 105-11[g][1])

—Executive Physicals. Under reinstated regulations, reimbursements paid under a plan for routine medical diagnostic procedures for an employee may be excluded from gross income if the requirements of section 105(b) are satisfied. This exclusion applies to medical diagnostic procedures treated as health benefits under a plan notwithstanding the fact that the IRS has announced that executive physicals may not be excluded from income as a working condition fringe benefit (reg. sec. 1.132-5[a][1][iv]).

—Accidental Death and Disability and Travel Insurance. Under section 89, accidental death and disability and travel insurance were subject to nondiscrimination testing as health benefits. Prior to that time, plans providing such benefits were not considered "health benefits" for the purpose of the section 105(h) nondiscrimination rules, but were excluded from gross income under section 106. Under the reinstated regulations, these benefits are arguably no longer treated as health benefits subject to nondiscrimination testing under section 105[h].

• Treatment of Reimbursements (reg. sec. 1.105-11[c][3][i]).

The nondiscriminatory benefits test is applied to the benefits subject to reimbursement under the plan rather than the actual benefit payments or claims under the plan.

—Reimbursement Limitation Allowed. A plan may establish a maximum limit for the amount of reimbursement which may be paid a participant for any single benefit or combination of benefits. However, any maximum limit attributable to employer contributions must be uniform for all participants (including the dependents of employees who are participants) and may not be modified by reason of a participant's age or years of service.

—Treatment of Compensation-Based Reimbursements. A plan is discriminatory if it covers employees who are highly compensated individuals, and the type or the amount of benefits subject to reimbursement under the plan are in proportion to employee compensation.

• Treatment of Optional Benefit Plans (reg. sec. 1.105-11[c][3[i]).

A plan that provides optional benefits to participants will be treated as providing a single

benefit with respect to the benefits covered by the option if 1) all eligible participants may elect any of the benefits covered by the option and 2) there are either no required employee contributions or the required employee contributions are the same amount.

Discriminatory Operation (reg. sec. 1.105-11[c][3][ii])

In addition to not discriminating on its face in providing benefits in favor of highly compensated individuals, the plan also must not discriminate in favor of such employees in actual operation. In that regard, a plan is not discriminatory merely because highly compensated individuals participating in the plan utilize a broad range of plan benefits to a greater extent that do other employees participating in the plan. However, in the case of plan or benefit termination, prohibited discrimination may occur where the duration of a particular benefit coincides with the period during which a highly compensated individual utilizes the benefit.

Treatment of Benefits Provided to Retired Employees (reg. sec. 1.105-11[c][3][iii])

Nondiscriminatory Benefits. A benefit shall not be considered discriminatory to the extent that an employer provides benefits under a self-insured medical reimbursement plan to a retired employee that would otherwise be excludable from gross income under section 105(b), determined without regard to section 105(h).

Benefits Which May be Considered Discriminatory. Benefits which are provided to a retired employee under a self-insured medical reimbursement plan may be considered discriminatory if such employee was highly compensated and the type, and dollar limitations, of benefits provided retired individuals are not the same for all other retired participants.

Multiple Plans (reg. sec. 1.105-11[c][4]).

In General (reg. sec. 1.105-11[c][4][i]). An employer may designate two or more plans as constituting a single plan that is intended to satisfy the nondiscrimination tests. A determination that the combination of plans so designated fails to satisfy such requirements does not preclude a determination that one or more of such plans, considered separately, satisfies such requirements. A single plan document may be utilized by an employer for two or more separate plans provided that the employer designates the plans that are to be considered separately and the applicable provisions of each separate plan.

Special Nondiscrimination Rule Applicable to Combined Plans (reg. sec. 1.105-11[c][4][ii]). If the designated combined plan discriminates as to eligibility to participate or benefits, the amount of excess reimbursement is determined under the same rules which govern excess reimbursement of highly compensated employees under a single self-insured medical reimbursement plan, taking into account all reimbursements made under the combined plan.

Excess Reimbursement of Highly Compensated Individuals (sec. 105[h][7] and reg. sec. 1.105-11[e])

In General (reg. sec. 1.105-11[e][1])

A reimbursement paid to a highly compensated individual is an excess reimbursement if it is paid pursuant to a plan that fails to satisfy the eligibility or benefits test for the plan year. The amount of the excess reimbursement is not excludable from the individual's gross income under section 105(b).

Excess Reimbursement Determination

Discriminatory Benefit (reg. sec. 1.105-11[e][2])

In the case of a benefit which discriminates in favor of highly compensated individuals, the amount of excess reimbursement equals the total amount reimbursed to the highly compensated individual with respect to the benefit.

Discriminatory Coverage (reg. sec. 1.105-11[e][3])

In the case of a plan which discriminates in favor of highly compensated employees with respect to eligibility to participate in the plan, the amount of excess reimbursement is determined by multiplying the total amount reim-

bursed to the individual by a fraction. The numerator of the fraction is the total amount reimbursed during that plan year to all highly compensated individuals. The denominator of the fraction is the total amount reimbursed during that plan year to all participants. In computing the fraction and the total amount reimbursed to the individual, discriminatory benefits are not taken into account.

Reporting and Withholding Requirements

Although the excess benefits reimbursement amount is subject to income tax withholding, an employer may delay income tax withholding to the end of the calendar year (I.R.S. Ann. 85-119, I.R.B. 1985-31). The excess benefits reimbursement amount is exempt from FICA and FUTA taxes under sections 3121[a][2][B] and 3306[b][2][B].

Plan Qualification (reg. sec. 1-105-5[a], 1.105-11[b] and 1.105-11[c][3][ii])

Under the reinstated regulations, self-insured medical reimbursement plans must satisfy certain plan qualification requirements: 1) The plan must be in writing (reg. sec. 1-105-11[b][1][i]); 2) The duration of the plan may not be so short that it has the effect of discriminating in favor of highly compensated employees (reg. sec. 1-105-11[c][3][ii]); and 3) The plan must be legally enforceable, or notice and knowledge of the plan benefits must be reasonably available to employees (reg. sec. 1-105-5[a]).

GROUP TERM LIFE INSURANCE (SEC. 79)

Group-Term Life Insurance Plan - General Requirements (sec. 79[a] and reg. sec. 1.79-1[a])

For the purpose of section 79, a plan provides group-term life insurance if 1) It provides a general death benefit that is excludable from income under section 101[a]; 2) It is provided to a group of employees; 3) It is provided under a policy carried directly or indirectly by the employer; and 4) The amount of insurance provided to each employee is computed under a formula that precludes individual selection, based on factors such as age. years of service, compensation or position.

Group Must Include 10 Or More Employees (reg. sec. 1.79-1[c][1])

In general, life insurance provided to a group of employees cannot qualify as group-term life insurance for purposes of section 79 unless, at some time during the calendar year, it is provided to at least 10 full-time employees who are members of the group of employees.

Exceptions To the Requirement That A Group Include 10 Or More Employees (reg. sec. 1.79-1[c])

A plan that fails to satisfy the group requirement may still be considered as providing group-term life insurance if the plan meets the conditions of either Exceptions A or B (below).

Exception A (reg. sec. 1.79-1[c][2]).

- The insurance is provided to all full-time employees of the employer, or if evidence of insurability affects eligibility, to all full-time employees who provide evidence of insurability satisfactory to the insurer.

- The amount of insurance provided is computed either as a uniform percentage of compensation or on the basis of coverage brackets established by the insurer. Under this rule, 1) the amount computed under either method may be reduced in the case of employees who do not provide evidence of insurability satisfactory to the insurer, and 2) no bracket may generally exceed 2 1/2 times the next lower bracket and the lowest bracket must be at least 10 percent of the highest bracket. However, the insurer may establish a separate schedule of coverage brackets for employees who are over age 65, but no bracket in the over-age 65 schedule may exceed 2 1/2 times the next lower bracket and the lowest bracket in the over-age 65 schedule must be at least 10 percent of the highest bracket in the basic schedule.

• Evidence of insurability affecting an employee's eligibility for insurance or the amount of insurance provided to that employee is limited to a medical questionnaire completed by the employee that does not require a physical examination.

(1) Exception B (reg. sec. 1.79-1[c]3])

• The insurance is provided under a common plan to the employees of two or more unrelated employers.

• The insurance is restricted to, but mandatory for all employees of the employer who belong to or are represented by an organization (such as a union) that carries on substantial activities in addition to obtaining insurance.

• Evidence of insurability does not affect an employee's eligibility for insurance or the amount of insurance provided to that employee.

Employees Excludable Under Exceptions A and B (reg. sec. 1.79-1[c][4])

Under Exceptions A and B, employees are not taken into account if they are denied insurance because 1) They are not eligible for insurance under the terms of the policy because they have not been employed for a waiting period (no longer than 6 months) specified in the policy; 2) They are part-time employees (employees whose customary employment is for not more than 20 hours in any week, or 5 months in any calendar year); or 3) They have reached the age of 65.

Treatment of Mandatory Employee Contributions to a Plan that Includes Life Insurance and Permanent Benefits (reg. sec. 1.79-1[c][5])

For the purposes of Exceptions A and B, insurance is considered to be provided to an employee who elects not to receive insurance unless, in order to receive the insurance, the employee is required to contribute to the cost of benefits other than term life insurance. An employee who must contribute to the cost of permanent benefits to obtain term life insurance is not taken into account in determining whether the term life insurance is provided to 10 or more employees unless the term life insurance is actually provided to such employee.

Effect of Combining Group-Term Life Insurance With Other Benefits (reg. sec. 1.79-1[b][1] and [2])

No part of the life insurance provided under a policy that provides a permanent benefit is group-term life insurance unless 1) the policy or the employer designates in writing the part of the death benefit provided to each employee that is group-term life insurance and 2) the part of the death benefit that is provided to an employee and designated as the group-term life insurance benefit for any policy year is not less than the difference between the total death benefit provided under the policy and the employee's deemed death benefit at the end of the policy year.

Determining Permanent Benefit Income Inclusion (reg. sec. 1.79-1[d]).

If an insurance policy that meets the requirements of section 79 provides permanent benefits to an employee, the cost of the permanent benefits reduced by the amount paid for permanent benefits by the employee is includable in the employee's gross income.

Income Inclusion (sec. 79[a])

In General (sec. 79[a][1] and [2])

An employee must include in gross income an amount equal to the cost of group-term life insurance on his life provided under a policy (or policies) carried directly or indirectly by his employer; but only to the extent that such cost exceeds the sum of 1) the cost of $50,000 of such insurance, and 2) the amount (if any) paid by the employee toward the purchase of such insurance.

Exceptions (sec. 79[b][1], [2] and [3])

(1) A key employee must ***include*** in gross income an amount equal to the employer paid cost of a discriminatory group-term life insurance plan which provides group-term life insurance on his life.

(2) Any employee may ***exclude*** from gross income all amounts paid by the employer for group-term life insurance on the life of an employee under which 1) the employer is directly or

indirectly the beneficiary, or 2) a charity (defined at section 170[c]) is the sole beneficiary for the entire period during which the employee receives such insurance, or 3) the cost of group-term life insurance is provided under a contract to which 72[m][3] applies.

(3) Section 79 ***does not apply*** to life insurance in excess of the limits under applicable state law on the amount of life insurance that can be provided to an employee under a single contract of group-term life insurance (reg. sec. 1.79-1[e]).

Determination of Insurance Cost (sec. 79[c], reg. sec. 1.79-3[d][2] and sec. 1.79-3T)

The cost of group-term life insurance is determined on the basis of uniform premiums (computed on the basis of 5-year age brackets) prescribed by regulation issued by the Secretary.

Cost of Group-Term Life Insurance Provided Before January 1, 1989 (1.79-3[d][2]

For the cost of group-term life insurance provided before January 1, 1989, the following table sets forth the cost of $1,000 of group-term life insurance for one month, computed on the basis of 5-year age brackets. For purposes of the table, the age of the employee is the employee's attained age on the last day of the employee's taxable year. In the case of an employee who has attained an age greater than age 64, the employee is treated as if he or she were in the 5-year age bracket 60 to 64.

5-year age bracket	Cost per $1000 for 1 month
Under 30	$0.08
30 to 34	.09
35 to 39	.11
40 to 44	.17
45 to 49	.29
50 to 54	.48
55 to 59	.75
60 to 64	1.17

Cost Of Group-Term Life Insurance Provided After December 31, 1988 (reg. sec. 1.79-3T)

For the cost of group-term life insurance provided after December 31, 1988, the following table sets forth the cost of $1,000 of group-term life insurance for one month, computed on the basis of 5-year age brackets. For the purposes of the table, the age of the employee is the employee's attained age on the last day of the employee's taxable year.

5-year age	Cost per $1,000 for 1 month
Under 30	$0.08
30 to 34	09
35 to 39	.17
45 to 49	.29
50 to 54	.48
55 to 59	.75
60 to 64	1.17
65 to 69	2.10
70 and above	3.76

Nondiscrimination Tests (sec. 79[d])

A group-term life insurance plan is a discriminatory plan if it discriminates in favor of key employees with respect to eligibility to participate, or benefits provided under the plan.

Eligibility Test (sec. 70[d][3])

In General

The eligibility test is satisfied if the plan passes both a percentage test and a classification test.

- Percentage Test (sec. 79[d][3][A[i] and [ii]). A plan satisfies the percentage test if the plan benefits 70 percent or more of all nonexcludable employees and at least 85 percent of all employees who are participants in the plan are not key employees.

- Classification Test (sec. 79[d][3][A][iii]). Under the reinstated regulations, the classification test was satisfied if the plan was offered to

a fair cross section of all employees found by the Internal Revenue Service not to be discriminatory in favor of highly compensated individuals applying the same standards as are applied under section 410(b)(1)(B). However, regulations proposed to be effective for plan years commencing after December 31, 1988 would make substantial changes to the reasonable classification test based upon "safe" and "unsafe" harbors (proposed regulation section 1.410(b)-4, I.R.B. 1989-27)

Special Rule for Cafeteria Plans (sec. 79[d][3][A][iv])

In the case of a group term life insurance plan maintained as part of a cafeteria plan, the eligibility test is satisfied if the requirements of section 125 are met.

Benefits Test (sec. 79[d][4])

A group-term life insurance plan satisfies the benefits test if all benefits available to participants who are key employees are available to all other employees.

Benefit Discrimination Determination (reg. sec. 1.79-4T Q&A 9)

- Fixed Amount of Insurance Coverage. A group-term life insurance plan will be considered not to discriminate in favor of key employees, as to the amount of benefits available if the plan provides a fixed amount of insurance which is the same for all covered employees.

- Benefits Other Than In A Fixed Amount. A group-term life insurance plan will be considered not to discriminate in favor of key employees if the plan contains no group of employees described in the following sentence that, if tested separately, would fail to satisfy the eligibility test. The group subject to the separate testing consists of key employee and all other plan participants (including other key employees) who receive, under the plan, an amount of insurance (as a multiple of compensation) that is equal to or greater than the amount of insurance received by such key employee.

Treatment of Additional Coverage (reg. sec. 1.79-4T Q&A-10)

- In General. The extent to which an employee purchases additional coverage under a group-term life insurance plan is not considered for purposes of determining whether a plan is discriminatory. However, if additional insurance coverage is available only to a key employee(s) that is not available, on a nondiscriminatory basis, to non-key employees, the plan will be considered discriminatory, even if the full cost of such additional insurance coverage is paid by the employee electing such coverage.

- Special Rule for Cafeteria Plans. In the case of a cafeteria plan, the choice of an amount of group-term life insurance as a benefit under such plan is treated as the purchase of group-term life insurance by an employee.

Partial Year Discrimination (reg. sec. 1.79-4T Q & A 11)

A group-term life insurance plan that is discriminatory at any time during the key employee's taxable year is considered discriminatory for that taxable year.

DEPENDENT CHILD CARE PLANS (SEC. 129)

Income Exclusion (sec. 129[a])

In General

Amounts paid or incurred by the employer for dependent care assistance provided to an employee are excluded from gross income if the assistance is furnished under a dependent care plan that satisfies both the nondiscrimination and qualification requirements set forth in section 129.

Special Rule For Non-Highly Compensated Employees (sec. 129[d]1])

A plan that would qualify as a dependent care assistance plan but for failure to meet the requirements of section 129(d) shall, notwithstanding such failure, be treated as a dependent

care assistance plan in the case of non-highly compensated employees.

Exclusion Limitation (sec. 129[a][2])

The income exclusion may not exceed $5,000 annually, or $2,500 in the case of a married individual who files a separate return. Marital status is determined under section 21(e)(3) and (4).

Highly Compensated Employees (sec. 414[q])

For the purpose of both the eligibility and average benefits tests, a highly compensated employee is any nonexcludable individual who during the current or preceding year was 1) a 5-percent owner, 2) paid more than $81,720, 3) paid more than $54,480 and was one of the top-paid 20 percent of all employees, or 4) was at any time an officer and was paid more than $49,032 (The dollar amounts applicable in 1989 will be adjusted annually to reflect inflation).

Employees Excluded From Testing (sec. 129[d][9])

For the purpose of both the eligibility and average benefits tests, an employer may exclude the following individuals:

1. Employees who have not attained the age of 21.

2. Employees who have not completed one year of service. A year of service is defined as a 12 month period during which the employee has worked at least 1,000 hours (sec. 410[a][3]).

3. Employees excluded from a dependent care assistance program who are included in a collective bargaining agreement, if there is evidence that dependent care benefits were the subject of good faith bargaining between the employee representative(s) and the employer.

Treatment of Leased Employees (proposed regulation sec. 1.414[n]-3[b][2])

The eligibility and benefits tests apply to the employer's entire workforce, including leased employees.

Nondiscrimination Tests (sec. 129[d])

Assistance under a dependent child care plan may be excluded from employee gross income only if the plan satisfies an eligibility test, 55 percent average benefits test, and a concentration test.

Eligibility Test (sec. 129[d][3])

Under the reinstated regulations, the classification test was satisfied if the plan was offered to a fair cross section of all employees found by the Internal Revenue Service not to be discriminatory in favor of highly compensated individuals applying the same standards as are applied under section 410[b][1][B]. However, regulations proposed to be effective for plan years commencing after December 31, 1988 would make substantial changes to the reasonable classification test based upon "safe" and "unsafe" harbors (proposed regulation section 1.410[b]-4, I.R.B. 1989-27).

Effective Date

The eligibility test currently applies to all dependent care assistance plans.

The 55 Percent Benefits Test (sec. 129[d][8])

In General

A plan satisfies the 55 percent benefits test if the average benefits provided to non-highly compensated employees under all plans of the employer is at least 55 percent of the average benefits provided to highly compensated employees under all plans of the employer.

Special Rule for Salary Reduction Arrangements

• In the case of benefits provided under a salary reduction agreement, a plan may disregard any employee whose compensation is less than $25,000.

• For the purpose of the 55 percent benefits test, an employer may elect to determine compensation on any basis which does not discriminate in favor of highly compensated employees.

Effective Date (sec. 129[d][8])

The 55 percent benefits test applies to plan years beginning after December 31, 1989.

Concentration Test (sec. 129[d][4])

Under the concentration test, not more than 25 percent of the amounts paid or incurred by the employer for dependent care assistance may be provided for 5-percent owners (their spouses or dependents).

Plan Qualification (sec.129[d][1], [6], and [7])

Under both former and current law, dependent care assistance plans must satisfy four plan qualification requirements: 1) The plan must be in writing; 2) The plan must be maintained for the exclusive benefit of employees; 3) Reasonable notification of the availability and terms of the plan must be provided to all eligible employees; and 4) No later than January 31 of each year, the employer must provide each employee with a written statement showing the amounts paid or expenses incurred by the employer in providing dependent care assistance during the previous calendar year.

Reporting Dependent Care Assistance (sec. 129[d][6], sec. 6051[a][9] and I.R.S. Notice 89-11, I.R.B. 1989-49)

Under sections 129[d][6] and 6051[a][9] an employer is required to provide a written statement to the employee showing the total amounts paid or incurred for dependent care assistance with respect to the employee under a dependent care assistance plan described in section 129. Sections 129[d][6] and 6051[a][9] are both satisfied by reporting the amount of dependent care assistance in Box 16 of Form W-2, Wage and Tax Statement, and labeling the amount "DCB." If an employee receives benefits under two or more qualified dependent care assistance plans maintained by the employer, the amount reported is the sum of the amounts attributable to the total benefits provided to the employee under all such plans.

Benefit Valuation

Cash Reimbursement Under A Sec. 125 Salary Reduction Arrangement

• In General. The amount reported in Box 16 of Form W-2 is the total amount of reimbursement provided by the employer to the employee for dependent care assistance covered under the plan that was furnished to the employee during the calendar year (including reimbursement after the end of the year for assistance provided during the year).

• Reasonable Estimate When Actual Reimbursement Amount Unknown. If the employer does not know the actual total amount of the cash reimbursement at the time the Form W-2 is prepared, the employer may report a reasonable estimate of the total amount on Form W-2. For reporting purposes, the amount electively contributed by an employee for the year for dependent care assistance under the plan (plus any employer matching contributions) shall be considered a reasonable estimate.

In-Kind Assistance (sec. 129[e][8])

• In General. The amount reported in box 16 of Form W-2 is the fair market value of the dependent care assistance provided by the employer to the employee during the calendar year under the plan (less the amount of any after-tax contributions made by the employee for such assistance).

—Determining Fair Market Value. Fair market value is determined based on the employer's reasonable estimate of the amount an

employee would pay in an arm's-length transaction for dependent care assistance of the type and quality actually furnished by the employer to the employee.

I.R.S. guidance for calendar year 1989 provides that an employer is permitted, but is not required, to estimate the fair market value of in-kind assistance provided to an employee of 125 percent of reasonably estimated direct costs (those costs directly related to management or operation of a day care facility). The result is 125 percent of direct costs divided by the total number of dependents the facility is permitted to care for and divided further by the number of days the facility is open. The result is the deemed daily cost per dependent at the facility. This result is then multiplied by the number of days that each dependent of the employee made use of the facility (At its option, the employer may adjust the preceding calculations to take into account the fact that individual dependents make use of the facility for only a portion of the full working day).

- Section 125 Salary Reduction Arrangements. The amount electively contributed by the employee for the calendar year for dependent care assistance under the plan (plus any employer matching contributions) may be reported in Box 16 of Form W-2, but only if such amount is the fair market value of the dependent care assistance provided by the employer to the employee.

CAFETERIA PLANS (SECTION 125)

Cafeteria Plan - General Definition (sec. 125[d], reg. sec. 1.125-2T Q&A-1, and proposed reg. sec. 1.125-1 Q&A-2)

A cafeteria plan is a separate written benefit plan maintained by an employer for the benefit of its employees, under which all participants are employees and each participant may select (before the benefits become currently available to the participant) among two or more benefits consisting of cash and qualified benefits.

Cash Benefits (reg. sec. 1.125-2T Q&A-1, proposed reg. sec. 1.125-2 Q&A-4[b] and sec. 1.125-1 Q&A-5)

A benefit is a cash benefit if 1) Such benefit does not defer the receipt of compensation; 2) An employee who receives such benefit purchases such benefit with after-tax employee contributions or is treated, for all purposes under the Internal Revenue Code, as receiving, at the time that such benefit is received, cash compensation equal to the full value of such benefit at such time and then purchasing such benefit with after-tax employee contributions; and 3) Such benefit would satisfy any eligibility, coverage, or nondiscrimination requirements that would apply if such benefit were designed to be provided on a nontaxable basis with employer contributions.

Qualified Benefits (reg. sec. 1.125-2T[1], proposed reg. sec. 1.125-1 Q&A-4[a] and sec. 1.125-1 Q&A-5)

A benefit is a qualified benefit under a cafeteria plan if the benefit 1) does not defer the receipt of compensation, 2) is not includible in employee gross income by reason of an express provision of Chapter 1 of the Internal Revenue Code, and 3) satisfies any applicable eligibility, coverage, or nondiscrimination requirement.

Permissible Qualified Benefits (proposed reg. sec 1.125-2 Q&A-4[a][2])

A cafeteria plan may offer coverage under an accident or health plan (sec. 105 and 106), group-term life insurance plan of up to $50,000 (sec. 79), group-term life insurance which is includible in gross income only because it is in excess of $50,000 or is on the lives of the participant's spouse and/or children, qualified group legal services plan (sec. 120), and participation in a qualified cash or deferred arrangement that is part of a profit-sharing or stock bonus plan (sec. 401[k]). In addition, a cafeteria plan may offer vacation days if the plan precludes any participant from using, or receiving cash for, in a subsequent plan year, any such paid vacation days remaining unused as of the end of the plan year.

Benefits Paid For With After-Tax Dollars (proposed reg. sec. 1.125-2 Q&A-4[a][2])

A cafeteria plan may offer participants the opportunity to purchase, with after-tax employee contributions, coverage under a accident or health plan (sec. 105[e]), group-term life insurance plan (sec. 79), qualified group legal services plan (sec. 120), dependent care assistance program (sec. 129), and/or contributions to a qualified plan subject to section 401[m].

Impermissible Benefits (reg. sec. 1.125-2T Q&A-1 and proposed reg. sec. 1.125-2 Q&A-4[d])

A cafeteria plan may not offer a benefit that defers the receipt of compensation (other than the opportunity to make elective contributions under a qualified cash or deferred arrangement) and may not operate in a manner that enables participants to defer the receipt of compensation. In addition, for the purpose of determining permissible benefits under a cafeteria plan, the following benefits do not constitute qualified benefits or cash: scholarships and fellowships (sec. 117), vanpooling (sec. 124), educational assistance (sec. 127), meals and lodging (sec. 119), or fringe benefits of the type described at section 132.

Tax Treatment of Benefits - Exception to the Constructive Receipt of Compensation Rule (sec. 125[a] and proposed reg. sec. 1.125-1 Q&A-1)

A participant in a cafeteria plan will not be treated as having received the taxable benefits offered under the plan solely because the participant has the opportunity (before the benefits become currently available to the participant) to choose among the taxable and nontaxable benefits offered under the plan.

Special Rule for Highly Compensated Participants (sec 125[b][1])

The exception to the constructive receipt rule does not apply to highly compensated participants if the cafeteria plan discriminates in favor of such employees with respect to eligibility to participate, or contributions and benefits.

Definition of Highly Compensated Participant (sec. 125[e])

The term highly compensated participant means a participant who is an officer, over-5 percent owners, or highly compensated participants and their spouse and dependent(s). (NOTE: The statute no longer cross-references the section 414(q) definition of a highly compensated employee.)

Special Rule for Key Employees (sec. 125[b][2])

The exception to the constructive receipt rule does not apply to key employees if such employees may receive more than 25 percent of all nontaxable benefits provided all employees under the plan.

Definition of Key Employee (sec. 416[i][1][A])

The term key employee means an employee who, at any time during the plan year or any of the 4 preceding plan years is 1) An officer of the employer having an annual compensation greater than 50 percent of the amount in effect under section 415[b][1][A] for such plan year; 2) One of the 10 employees having annual compensation from the employer of more than the limitation in effect under section 415[c][1][A] and owning the largest interests in the employer; 3) A 5-percent owner of the employer; or 4) A 1-percent owner of the employer having an annual compensation from the employer of more than $150,000.

Nondiscrimination Tests (sec. 125[g])

In addition to the separate nondiscrimination tests that apply to each of the statutory benefits offered under a cafeteria plan, a cafeteria plan must satisfy an eligibility test, plan contribution test, benefits test, and key employee concentration test. For the purpose of applying the cafeteria plan nondiscrimination tests, employers may exclude 1) Nonresident aliens; 2) Employees with less than three years of service; and 3) Employees included in a collective bargaining agreement, if there is evidence that the cafeteria plan benefits were the subject of good faith bargaining between the employee representative(s) and the employer.

Eligibility Test (sec. 125[g][3])

A cafeteria plan satisfies the eligibility test if 1) The plan benefits a fair cross section of employees (sec. 410[b] [2][A][i]); 2) No employee is required to complete more than 3 years of employment with the employer or employers maintaining the plan as a condition of participation in the plan; 3) The employment requirement for each employee is the same; and 4) Any employee who has satisfied the employment requirement and who is otherwise entitled to participate in the plan commences participation no later than the first day of the first plan year beginning after the date the employment requirement was satisfied (unless the employee was separated from service before the first day of that plan year).

Contribution And Benefits Test (sec. 125[c] and proposed reg. sec. 1.125-1 Q&A-19)

Under the contribution and benefits test, a cafeteria plan must not discriminate in favor of highly compensated employees with respect to benefit availability and selection, or in actual operation.

Benefit Availability and Selection

A cafeteria plan satisfies the availability and selection portion of the benefits test if total nontaxable benefits and total benefits (i.e., actual benefit selection), or employer contributions allocable to total benefits, do not discriminate in favor of highly compensated participants.

Discriminatory Operation

In addition to not discriminating as to either benefit availability of benefit selection, a cafeteria plan must not discrimination in favor of highly compensated participants in actual operation. Such discrimination may occur if the duration of the plan (or of a particular nontaxable benefit offered under the plan) coincides with the period during which highly compensated participants utilize the plan (or the benefit).

Special Rules

Collectively Bargained Plans Exempt From NonDiscrimination Testing (sec. 125[g][1])

A cafeteria plan will not be considered discriminatory if it is maintained under a collective bargaining agreement.

Cafeteria Plans Which Provide Health Benefits (sec. 125[g][2]

A cafeteria plan which provides health benefits satisfies the plan contribution and benefits test if 1) contributions under the plan on behalf of each participant include an amount which equals 100 percent of the cost of the health benefit coverage under the plan of the majority of the highly compensated participants similarly situated, or at least 75 percent of the cost of the highly compensated employee having the highest cost benefit coverage under the plan, and 2) contributions and benefits in excess of such amounts bear a uniform relationship to compensation.

Salary Reduction Agreements (proposed reg. sec. 1.125-1 Q&A-6)

A plan document may provide that the employer will make employer contributions, in whole or in part, pursuant to a salary reduction agreement under which participants elect to reduce their compensation and to have such amounts contributed, as employer contributions, by the employer on their behalf. A salary reduction agreement will have the effect of causing the amounts contributed thereunder to be treated as employer contributions only to the extent the agreement relates to compensation that has not been actually or constructively received by the participant as of the date of the agreement, and subsequently, does not become currently available to the participant. A plan document may also provide that the employer will make employer contributions on behalf of participants equal to specified amounts (or specified percentages of compensation) and that such nonelective contributions will be available to participants for the selection of purchase of benefits under the plan.

Optional Group-Term Life Insurance Coverage (reg. sec. 1.79-4T Q&A-10)

For the purpose of nondiscrimination testing, the choice of a participant to purchase additional group-term life insurance under a cafeteria plan is treated as a purchase by the employee.

Flexible Spending Arrangements–Health Plans (proposed reg. sec. 1.125-1 Q&A-17 and 1.125-2 Q & A-7)

In General (proposed reg. sec. 1.125-2 Q&A-7)

In order to qualify for tax-favored treatment under sections 105 and 106, health plans that are flexible spending arrangements (FSAs) must conform to the rules generally applicable to those sections. A health FSA will not qualify for tax favorable treatment under section 105 and 106 if the effect of the reimbursement arrangement eliminates all (or substantially all) risk of loss to the employer maintaining the plan or other insurer. In addition, under regulations proposed March 27, 1989 (I.R.B. 1989-3), a FSA would be required to satisfy the requirements set forth below.

Uniform Coverage Throughout Coverage Period (proposed reg. sec. 1.125-2 Q&A-7[b][2])

The maximum amount of reimbursement under a health FSA must be available at all times during the period of coverage (properly reduced as of any particular time for prior reimbursements for the same period of coverage).

- Reimbursement will be deemed to be available at all times if it is paid at least monthly or when the total amount of the claims to be submitted is at least a specific, reasonable minimum.

- If the employee revokes existing elections, the employer must reimburse the employee for any amount previously paid for coverage or benefits relating to the period after the date of the employee's separation from service regardless of the employee's claims or reimbursements as of such date.

Twelve Month Period Of Coverage (proposed reg. sec. 1.125-2 Q&A-7[b][3])

The period of coverage under a health FSA must be 12 months, or in the case of a short first plan year or a short plan year of a cafeteria plan where the plan year is being changed, the entire plan year. In general, election changes to increase or decrease the level of coverage under a health FSA during the 12-month period of coverage are not permitted.

- Cafeteria Plan Exceptions. In the case of a cafeteria plan, changes to a health FSA will be permitted to 1) Permit participants to make changes for the remaining portion of the 12-month period of coverage on account of and consistent with certain family status changes; 2) Permit an employee who separates from the service of the employer during a period of coverage to revoke existing benefit elections and terminate receipt of benefits; and 3) Terminate the coverage of an employee who ceases to make required premium payments (if an employee is terminated for failure to make required premium payments, s(he) may not make a new health FSA benefit election for the remaining portion of the original coverage period).

Prohibited Reimbursement (proposed reg. sec. 1.125-2 Q&A-7[b]4])

A health FSA may only reimburse medical expenses defined in section 213 (allowance of deduction for medical or dental expenses). This general prohibition does not prevent the payment of premiums for current health plan coverage from being paid on a salary reduction basis through the ordinary operation of the cafeteria plan.

Claims Substantiation (proposed reg. sec. 1.125-2 Q&A-7[b][5])

A health FSA may reimburse a medical expense only if the participant provides a written statement from an independent third party stating that the medical expense has been incurred and the amount of such expense, and the

participant provides a written statement that the medical expense has not been reimbursed or is not reimbursable under, any other health plan coverage.

Claims Incurred (proposed reg. sec. 1.125-2 Q&A-7[b][6])

Medical expenses reimbursed under a health FSA must be incurred during the participant's period of coverage under the FSA. Expenses are treated as having been incurred when the participant is provided the care. Expenses are not treated as as incurred during a period of FSA coverage if such expenses are incurred before the later of the date the health FSA is first in existence or the participant becomes enrolled under the health FSA.

FSA Experience Gains (proposed reg. sec. 1.125-2 Q&A-7[b][7])

The excess of the premiums paid and income (if any) of the FSA over the FSA's total claims reimbursements and reasonable administrative costs for the year may be used to reduce required premiums for the following year or may be returned to the premium payers as dividends or premium refunds on a reasonable and uniform basis. Although it is permissible to allocate such amounts based on the different coverage levels under the FSA received by the premium payers, it may not be based on the payers individual claims experience.

Effective Date (proposed reg. sec. 1.125-2 Q&A-7[d])

The rules applicable to health FSAs are effective for plan years beginning after December 31, 1989.

Flexible Spending Arrangements - Dependent Child Care Assistance Plans (proposed reg. sec. 1.125-2 Q&A-7[b][8])

With the exception of provisions governing uniform coverage throughout the coverage period, rules which apply to health FSAs are applicable to dependent child care assistance plans (sec. 129).

Qualification Rules (sec. 125[d] and proposed reg. sec. 1.125-2 Q&A-7[b][3])

Under reinstated law, cafeteria plans must satisfy certain plan qualification requirements: 1) The plan must be in writing; 2) The plan must be for the exclusive benefit of employees; and 3) The plan must be in effect for at least 12 months (except for initial partial plan years).

REPORTING AND RECORDKEEPING REQUIREMENTS

Reporting Requirements (sec. 6039D)

In General (sec. 6039D[a])

Every employer maintaining a specified fringe benefit plan must file an annual information return with the Internal Revenue Service (IRS Form 5500 series) no later than the last day of the seventh month following the end of the plan year.

Specified Fringe Benefit Plans (sec. 6039D[1])

A specified fringe benefit plan is any group-term life insurance plan (sec. 79), insured and self-insured health and accident plan (sec. 105 and sec. 106), group legal services plan (sec. 120), cafeteria plan (sec. 125), educational assistance plan (sec. 127), or dependent care assistance plan (sec. 129).

Effective Date

In the case of specified fringe benefit plans, the reporting requirements apply to all plan years beginning in 1989.

Information Return Requirements (sec. 6039D[a])

In General

Employers will be required to provide the following information to the Internal Revenue Service on the annual return: 1) The number of employees of the employer; 2) The number of em-

ployees of the employer eligible to participate under the plan; 3) The number of employees participating under the plan; 4) The total cost of the plan during the year; and 5) The name, address and employer identification number of the employer.

Additional Information May Be Required By The Secretary (sec. 6039D[c])

After an employer has filed the annual information return, (s)he may be required by the Secretary to file an additional return for that year. The request for additional information may relate to any information the Secretary may prescribe by regulation, but is likely to focus on information which is sufficient to show whether the nondiscrimination tests have been satisfied.

Penalty For Failure To File Annual Information Returns

Internal Revenue Code Penalty (sec. 6652[e])

In the case of a failure to file a return required under section 6039D, the tax penalty is $25 per day of continuing failure, not to exceed $15,000.

Department Of Labor Penalty (ERISA Sec. 502[c][2], as nibus Budget Reconciliation Act of 1987)

Under ERISA, a civil penalty of up to $1,000 may be assessed by the Department of Labor against a plan administrator who fails to file a complete Form 5500. A plan administrator may avoid the penalty if (s)he submits the omitted information within 45 days of the Department of Labors' initial rejection of Form 5500.

Recordkeeping Requirements

An employer who maintains a specified fringe benefit plan must keep records adequate to ensure compliance with the annual information return requirements as well as any future request by the Secretary for additional plan information.

SPECIFIED BENEFIT PLANS

Reinstatement And Extension Of Employer-Provided Educational Assistance Income Exclusion (sec. 127)

Exclusion of employer-provided educational assistance for courses taken at the undergraduate level was retroactively reinstated (the $5,250 exclusion expired December 31, 1988) and extended so that it expires for taxable years beginning after September 30, 1990. In addition, the provision clarifies application of the section 132(d) working condition fringe benefit exclusion to graduate-level courses, or employer assistance that exceeds the section 127 dollar limitation, provided the requirements of section 132(d) are otherwise satisfied.

Reinstatement And Extension Of Employer-Provided Group Legal Services Income Exclusion (sec. 120)

Exclusion of employer-provided group legal services retroactively reinstated (the $70 per year exclusion expired December 31, 1988) and extended so that it expires for taxable years beginning after September 30, 1990.

EXTENSION OF THE DURATION OF REQUIRED CONTINUATION HEALTH CARE COVERAGE FOR DISABLED QUALIFIED BENEFICIARIES (sec. 4980B[f])

In General

The provision amends the continuation coverage requirements of the Internal Revenue Code to provide that a qualified beneficiary who is determined to be disabled (under title II (OASDI) or XVI (SSI) of the Social Security Act) at the time of the qualifying event of termination of employment or reduction in hours of employment is entitled to 29 (as opposed to 18) months of continuation coverage, but only if the qualified beneficiary has provided notice of such determination before the end of the original 18 month period. Further, the provision provides that the extended continuation coverage may be terminated in the month that begins more than

30 days after the date of a final determination that the qualified beneficiary is no longer disabled.*

Required Notices

The provision amends the notice requirements to require that each qualified beneficiary who is determined to be disabled is responsible for notifying the plan administrator of such determination within 60 days after the date of the determination and for notifying the plan administrator within 30 days of the date of any final determination that the qualified beneficiary is no longer disabled.

Premium Increase Permitted

Under the new law, employers are allowed to charge 150 percent of the applicable premium for the eleven additional months of coverage provided to disabled qualified beneficiaries.

FRINGE BENEFITS (54 FR 28576, 26 CFR Parts 1 and 602)

On July 6, the Internal Revenue Service published final and temporary regulations governing the taxation and valuation of certain fringe benefits and exclusion from gross income for certain fringe benefits.

Taxation And Valuation Of Fringe Benefits

In general, the final regulations provide guidance in three specific areas of interest to local school districts, First, with respect to group-term life insurance, the regulations clarify that the cost of a policy on the life of an individual other than an employee (e.g., spouse of the employee), even if an incidental cost, is includable in the employee's gross income.

Secondly, the regulations provide exhaustive guidance to both employers and employees on the valuation and tax treatment of an automobile which is owned (or leased) by the employer and made available to an employee (or former employee) for his or her personal use.

Finally, the regulations expand the previous definition of "control employee" to clarify that a control employee of a state, or local governmental unit, is any elected official or employee whose compensation equals or exceeds the compensation paid to a federal government employee holding a position at Executive Level V.

Fringe Benefits Excluded From Taxation

Under section 132 of the Internal Revenue Code, certain fringe benefits may be excluded from gross income. The final regulations provide taxpayer guidance on the requirements a non-additional-cost service, qualified employee discount, or working condition fringe must meet to qualify for the gross income exclusion under section 132.

In addition, the new rules impose a limitation on the working condition fringe benefit exclusion in situations involving cash reimbursements, allowances, or advances. Beginning in 1989, the exclusion is limited to accountable arrangements, and may not be applied to cash reimbursements, allowances, or advances, unless the employee 1) Uses the payment for expenses otherwise deductible under section 162 or section 167 and in connection with a specific activity; 2) Verifies that the payment was in fact used for such expenses; and 3) Returns to the employer any part of the payment not so used.

CATASTROPHIC HEALTH CARE

Background

Under the Medicare Catastrophic Coverage Act of 1988 (MCCA) medicare coverage was expanded to provide benefits not previously available under medicare and protect beneficiaries against costs associated with a catastrophic illness. In some cases, the effect of expanding medicare coverage placed some medicare beneficiaries in the position of receiving the same coverage under both their employer's health benefit plan and under the medicare program. Because of the potential for duplication in health care benefit coverage, Congress included a maintenance of effort provision in section 421 of the MCCA. Under that section, an employer that provides duplicative benefits to an employee or retired employee as of July 31, 1988 must 1) provide to the employee or retired former employee additional benefits that are at least equal

in actuarial value to the duplicative benefits, 2) refund to the employee or retired dormer employee an amount of money equal in actuarial value to the duplicative benefits, or 3) provide a combination of additional benefits and refunds that total at least the actuarial value of the duplicative benefits.

Repeal Of The MCCA And Retention Of Section 421

On December 18, the President signed into law a bill to repeal large portions of the MCCA (P.L. 101-234). Under the terms of the repeal, the maintenance of effort provision of section 421 was retained for calendar year 1989.

Tax Treatment Of Benefits And Refunds Required By The Maintenance Of Effort Provision

Employer Elects To Provide Additional Accident Or Health Benefits

If an employer elects to comply with section 421 of the MCCA by providing additional accident or health benefits, those benefits are excludable from gross income under sections 105 and 106 of the Internal Revenue Code.

Employer Elects To Refund A Portion Of The Value Of Duplicative Benefits

• Inclusion In Gross Income. If an employer elects to comply with section 421 of the MCCA by refunding a portion of the value of the duplicative benefits, the refunded amounts are included in the gross income of the recipient under section 61 of the Internal Revenue Code.

• Income Tax Withholding Not Required Under Certain Circumstances. The IRS has determined that income tax withholding is not required with respect to refund payments provided such payments are reported consistent with the requirements set forth in Part III of IRS Notice 90-2 (I.R.B. 1990-2).

• Refund Payments Not Considered Wages For Certain Employment Taxes. The Omnibus Budget Reconciliation Act of 1989 provides that refund payments under section 421 of the MCCA do not constitute wages for purposes of FICA and FUTA.

Guidelines Published

Health Care Financing Administration

Guidelines issued by the Health Care Financing Administration (HCFA) for use by employers in determining whether they offered any duplicative benefits to their employees or retired former employees and, if so, the actuarial value of such benefits were published in the Federal Register on August 25 and December 6, 1989 (54 FR 35395 and 53 FR 49233).

IRS guidance to employers and medicare beneficiaries regarding the tax treatment and reporting requirements for refunds paid, or benefits received under, the maintenance of effort provision of the MCCA are the subject of IRS Notice 90-2 (I.R.B. 1990-2).

***ACCELERATION OF PAYROLL TAX DEPOSITS** (sec. 6302)*

Threshold Amount

Employers who are on the eighth-monthly payroll tax deposit system will be required to deposit those taxes at any time the total amount of payroll tax withholding reaches $100,000.

Deposit Schedule

Beginning after July 31, 1990, each time an employers' total payroll tax withholding equals the $100,000 threshold, (s)he will be required to deposit payroll taxes as follows:

1990 - By the close of the next banking day.
1991 - By the close of the second banking day.
1992 - By the close of the third banking day
1993 - By the close of the first banking day
1994 - By the close of the first banking day

INCLUSION OF DEFERRED COMPENSATION IN DETERMINATION OF WAGE-BASED ADJUSTMENTS (42 U.S.C. 402, 409, 413, 415, 424A and 430)

Background

By regulation, deferred compensation has

not been included in the calculation used by the Secretary of Health and Human Services to determine the average wages for social security purposes (and thereby, the maximum wage subject to FICA taxation). In 1990, the social security tax rate is 15.3 percent and the social security wage base ceiling is $51,300.

Calculation To Include Deferred Compensation Amounts

Under the new law, for purposes of calculating the annual increase in average wages, such wages will include deferred compensation.

Effective Date

Taxable Earnings Base

For 1988 and 1989, an estimate of deferred compensation will be included in average wages so that the 1990 taxable earnings base will reflect the inclusion of deferred compensation in average total wages. For years beginning after 1989, actual deferred compensation amounts will be used to make this determination.

Benefit Computations And Other Program Amounts

Although actual deferred compensation amounts will be included in the computation to determine benefit and other program amounts beginning with 1990 wages, it will not be reflected in benefit computations and other program amounts until 1993.

THE NSBA COUNCIL OF SCHOOL ATTORNEYS MEMBERSHIP INFORMATION

The NSBA Council of School Attorneys was initially formed to provide an information exchange network between attorneys representing school districts. As the practice of school law has grown more complex, the Council has adapted its services to meet the changing needs of members. The Council is the only National association whose mission is to promote the advancement and education of school law professionals.

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Student Discipline Policies & Procedures: A Practical Guide (1990) written by Kelly Frels, Jeffrey Horner, and Marie Schneider-Vogel. This new edition of the Council's 1984 publication explores the most recent litigation involving the administration of school discipline policies and procedures. The publication focuses on five student discipline areas: legal background, policy development, investigating and "prosecuting" procedures, discipline hearings, and a review of specific school discipline problems. Approx. 40 pages, Direct affiliates/Council Members-$20, Nonmembers- $25. ISBN 0-88364-154-2

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The National School Boards Association is a not-for-profit organization whose primary mission is the advancement of public education through the unique North American tradition of local citizen control of, and accountability for, the nation's public schools. Education policy is decided by local school board members who are directly accountable to the community. NSBA represents school boards' interests in Washington, D.C., before Congress and regulatory agencies, as well as state and federal courts.

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Since 1967 the National School Boards Association's Council of School Attorneys has provided information and practical assistance to attorneys who represent public school districts. As the only national advocacy organization composed exclusively of attorneys representing school boards, NSBA's Council advises NSBA and its members on school law issues. It offers continuing legal education programs, produces specialized publications, and provides up-to-the-minute analysis of the issues. Council seminars are valuable forums for school attorneys to exchange ideas and information.

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National School Boards Association
Council of School Attorneys
1680 Duke Street
Alexandria, Virginia 22314
(703)838-6722